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No. 89-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

MARY R. WELLS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Respondents, former employees of General Motors Corporation ("GM"), elected to leave their employment during an industry-wide slowdown in 1983. Under the terms of a Voluntary Termination of Employment Plan ("VTEP") negotiated between GM and respondents' union, each of the respondents received special severance payments of between $10,000 and $22,000. In 1986 GM's workforce began to expand again, but respondents were ineligible to obtain new positions with the company because they had accepted the VTEP benefits. They sued GM, claiming that at meetings held in 1983 to explain the VTEP to employees, GM assured them that they could be rehired if new jobs were created. The court of appeals held that respondents' state law fraud and misrepresentation claims were not pre-empted by federal law. The questions presented are:

Whether respondents' claims that GM misrepresented that they would be eligible for future employment even though they had accepted severance benefits under the negotiated VTEP agreement are pre-empted by:

(a) the National Labor Relations Act, because they allege conduct on the part of GM that arguably violates Section 8 of the Act;

(b) Section 301 of the Labor Management Relations Act, because they are substantially dependent upon the terms of a collective bargaining agreement between GM and respondents' union; or

(c) the Employee Retirement Income Security Act, because they relate to the terms of an employee benefit plan.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following persons were appellees in the court of appeals and are respondents in this Court:

Mamie L. Marshall
Patricia Ann Lewis
Johnny Lee Thompson
Connie Prentiss
Lavern Turner
Lee E. Mack
Rosie Lee Smith
Lillie Bullie
Emma Hall
Loretta Anderson
Mildred Cecilia Grigsby
Mao Lee
Katie Mae Warren
Mary Fields Ward
Direthia Maberry
Shirley S. Jones
Lenda Hamilton Burns
Billy Dewain Ferguson
Brenda Sue Ezell
Estella Dunson
Mary L. Taylor
Elaine W. Davis
Doris S. Brown
Sarah Buggs
Lois Marie Barnett
Herman Williams
Hugh Dorsey Thompson (Robinson)
Thomas Leon Ward
Shirley P. Taylor
Verililian Kay Grant
Sandra Beard Murphy

A listing of petitioner's subsidiaries (other than wholly-owned subsidiaries) and affiliates is set forth in the Appendix. App., *infra*, 52a.

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General Motors Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 881 F.2d 166. The opinion of the district court (App., *infra*, 25a-40a) is reported at 721 F. Supp. 107.

JURISDICTION

The court of appeals entered its judgment on August 24, 1989 (App., *infra*, 21a), and denied GM's petition for rehearing on September 28, 1989 (App., *infra*, 23a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), and Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), are set forth at App., *infra*, 51a.

STATEMENT

Respondents Mary R. Wells, *et al.*, are former GM employees who voluntarily left their jobs during a widespread reduction-in-force. Pursuant to a Voluntary Termination of Employment Plan ("VTEP") negotiated between GM and respondents' union, respondents each received between $10,000 and $22,000 in special severance benefits. They now claim that GM assured them at the time that if they accepted VTEP benefits they would nevertheless

be eligible for reemployment on a preferential basis or at least on the same basis as other applicants. GM asserts to the contrary that it informed the employees that VTEP beneficiaries would *not* be eligible for reemployment with the company.

Even though respondents' allegations, if true, would mean that GM arguably violated the National Labor Relations Act, even though the parties' dispute clearly relates to the terms of an agreement between an employer and a labor organization governed by the Labor Management Relations Act, and even though the dispute involves employee benefits regulated by the Employee Retirement Income Security Act, the court of appeals held that respondents' state law claims were not pre-empted by federal law. This ruling is plainly wrong and conflicts with numerous decisions of this Court and other courts of appeals on frequently recurring questions of federal preemption. Further review is essential to preserve the jurisdiction of the National Labor Relations Board, to protect the collective bargaining process, and to prevent piecemeal state regulation of employee benefit plans.

1. Respondents were employed in GM's Packard Electric Division plant in Clinton, Mississippi. As a result of a general slowdown in the automobile industry in the early 1980s, GM found it necessary to lay off several hundred Packard Electric employees at Clinton and thousands elsewhere. The prospect for reemployment of many of those on layoff appeared dim. App., *infra*, 1a-2a, 26a-27a.

The employees at Clinton are represented for purposes of collective bargaining by Local No. 698 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO. Responding to a demand from a group of laid-off Clinton workers, the union requested that GM consider a Voluntary Termination of Employment Plan ("VTEP") for Clinton. A VTEP allows employees to "cash in" their seniority rights and to terminate their employment rather

than remain on layoff status with its inherent uncertainty. On December 17, 1982, after a period of negotiations, the company and the union entered into a VTEP Agreement. App., *infra*, 2a, 27a, 41a-43a. It is undisputed that the question of whether employees who accepted VTEP benefits would be eligible for reemployment with GM was discussed during the negotiations. *Id.* at 3a.[1]

The VTEP Agreement provided that any "employee covered by the Collective Bargaining Agreement with Plant Seniority * * * will be eligible to apply for a termination allowance under this VTEP." App., *infra*, 41a. Benefits would be paid to only 450 employees, "subject to Management's approval consistent with business conditions." *Ibid.* In the event that more than 450 employees applied for VTEP benefits, beneficiaries would be selected on the basis of seniority. *Ibid.* GM was authorized to limit or delay processing of applications "based on [its] capability to operate the business and train employees" and retained the discretion to further limit, delay or deny applications from skilled trades employees. *Ibid.* The amount of severance benefits an employee was entitled to receive ranged from $10,000 to $22,000, depending on years of seniority and on whether the employee elected to receive the benefit in a lump sum or over 24 monthly installments. *Id.* at 42a. The amount of the VTEP benefit would be reduced by the amount of any excess supplemental unemployment benefit ("SUB") or other benefit received by the employee. *Ibid.* Any disputes regarding the amount of VTEP benefits or eligibility for those benefits could

[1] According to the court of appeals, GM claimed "that the parties raised the issue of 'rehire rights' in bargaining over the VTEP and that GM officials specifically told union representatives that employees opting for VTEP would not be eligible for rehire. [Respondents] and their union claim[ed] that the representatives asked about future eligibility and were told that would be 'no problem' ". App., *infra*, 3a.

be appealed under the procedures established by the SUB Plan. *Id.* at 43a.

An employee who applied for and received a VTEP benefit would be terminated as an employee and would lose his rights as an employee. App., *infra*, 42a. The VTEP Agreement did not expressly address the question of whether such an employee would be eligible for re-employment by GM, but the provision relating to repayment of benefits appeared to acknowledge that possibility (*id.* at 43a):

> If a former employee is again employed by the Division after he has received a VTEP, no repayment (except with respect to an overpayment) of the VTEP shall be required or allowed; and no seniority previously cancelled shall be reinstated.

The agreement also provided that if a former employee received a larger VTEP benefit than he was entitled to and did not otherwise return the overpayment, it "shall be recoverable from any monies receivable from the Company should the former employe be rehired." *Ibid.*

Following execution of the VTEP Agreement, management and union officials met with the Clinton employees (including those on layoff) to explain the plan's terms. App., *infra*, 2a, 27a-28a. According to respondents' allegations—which GM vigorously disputes (see *id.* at 3a)—GM managers at those meetings told employees that should they accept VTEP benefits, they would nevertheless be eligible for future employment either on a preferential basis or on the same terms as other applicants. *Id.* at 3a, 27a-28a, 46a.

2. In 1985, GM began hiring new employees at its Clinton plant. The company declined to consider applications from former employees who had accepted VTEP benefits. Respondents did not file a grievance under the collective bargaining agreement or challenge GM's position pursuant

to the appeal provisions set out in the VTEP Agreement. App., *infra*, 2a. Instead, they each filed a virtually identical diversity complaint in the United States District Court for the Southern District of Mississippi. A copy of the complaint of the lead plaintiff, Mary R. Wells, is set forth in the Appendix. *Id.* at 44a-50a. Respondent Wells claimed that GM "falsely and fraudulently, and with intent to deceive plaintiff, represented to plaintiff * * * that if competitive conditions improved and [GM] later began hiring employees * * * that those employees who had accepted VTEP benefits (VTEP employees) would be given preference over other applications for employment; and that VTEP employees would be eligible for employment at defendant's other locations on the same basis as other applicants." *Id.* at 46a. In the alternative, respondents claimed that the same misrepresentations by GM were negligent. *Id.* at 48a. GM moved for summary judgment on the grounds that the state law suits were pre-empted by the National Labor Relations Act, the Labor Management Relations Act, and the Employee Retirement Income Security Act. The district court denied GM's motion. *Id.* at 40a.

Finding that the pre-emption issues presented "controlling questions of law as to which there is substantial ground for difference of opinion," the district court certified its order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). App., *infra*, 2a.

3. The court of appeals affirmed. The court rejected GM's contention that respondents' claims fell within the exclusive jurisdiction of the National Labor Relations Board and were therefore pre-empted under the *Garmon* doctrine. GM argued that respondents' claims, if true, would show that GM violated Section 8(a)(5) by failing to bargain with the union over future employment eligibility. The court disagreed, holding that eligibility for future employment is not a mandatory subject of bargaining. In the

court's view, "evaluation and consideration of individual applicants for employment lies 'at the very core of entrepreneurial control.' The Supreme Court has held that these types of managerial decisions are not mandatory subjects of bargaining. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 498 (1979)." Therefore, any failure or refusal on GM's part to bargain with the union over that issue did not violate Section 8(a)(5) of the NLRA. App., *infra*, 5a-7a.

The court of appeals also rejected GM's argument that respondents' claims amounted to a charge that GM bargained directly with the employees and circumvented the union in arguable violation of Section 8(a)(5). App., *infra*, 7a-10a. Relying on this Court's decision in *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380 (1986), the court below held that a state law claim is no longer pre-empted under *Garmon* if the party asserting pre-emption contends that its own conduct is "arguably prohibited" by the Act (App., *infra*, 8a, 9a; emphasis in original):

> [T]he implication of GM's argument is that if its conduct indeed was wrong, it is the Board that should declare it so. We hold, however, that *Davis* defeats GM's attempt to invoke the NLRB's exclusive jurisdiction in this fashion.
>
> * * * * *
>
> By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claim could not reasonably be *upheld* by the Board.

The court of appeals held that the same analysis applied to GM's contention that "its failure to raise the issue of future employment eligibility amounted to a form of deception at the bargaining table and thus, a failure to bargain in good faith." App. *infra*, 9a n.7. Because GM's claim was that its own conduct was "arguably prohibited" by the Act, the court below held that it was not a claim

that could be "upheld" by the Board and thus did not pre-empt respondents' state law claims. *Ibid.*

Turning to GM's argument under Section 301 of the LMRA, the court of appeals held that respondents' claims were not pre-empted because they were not " '*substantially* dependent upon analysis of the terms' of the collective bargaining agreement" and because, in the court's view, respondents were not claiming that GM fraudulently misrepresented the terms of the VTEP, but that it "fraudulently *induced* individual employees to opt for the VTEP by making an extraneous promise concerning their future employment eligibility." App., *infra*, 14a (quoting *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985)). The court acknowledged that respondents' claims would nevertheless be preempted if the agreement governed the disputed issue, but it held that "[a]fter careful review of the VTEP, we find no provision that reasonably might be construed to govern the issue of future employment eligibility, nor are there 'vague and ambiguous' references to eligibility that might be construed in GM's favor." *Id.* at 16a.

Finally, the court of appeals held that respondents' claims were not pre-empted by ERISA because the VTEP does not constitute an "employee benefit plan" within the meaning of that statute. Relying on *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), the court held that the VTEP was not a plan because it did not require "an ongoing administrative program to meet the employer's obligation." App., *infra*, 19a. "The [VTEP] plan was not ongoing, nor was there any need for continuing administration of the payment program (though employees could elect a two-year installment payment option)." *Id.* at 20a.

Judge Reavley concurred in the judgment on the ground that "GM does not demonstrate any relationship between the VTEP and its decision not to rehire the plaintiffs." App., *infra*, 20a.

REASONS FOR GRANTING THE PETITION

When Congress passed the National Labor Relations Act, the Labor Management Relations Act and the Employee Retirement Income Security Act, it constructed comprehensive federal regulatory schemes that this Court has repeatedly protected from undue interference in the form of private lawsuits under state law. The court of appeals' decision circumvents those federal regulatory schemes and permits state law resolution of claims that concern (a) the obligation of a company to bargain with a union, (b) the consequences that flow from a collectively-bargained labor agreement, and (c) the operation of an employee benefit plan. In doing so, the court below has disregarded the decisions of this Court, has created or exacerbated conflicts with other courts of appeals on important and frequently recurring federal issues, and has established a precedent that will impair the achievement of important federal objectives. It is essential that this Court grant the petition to resolve the conflicts and to further define and preserve the proper scope of federal regulation.

I. The Court Of Appeals' Decision That Respondents' Claims Were Not Pre-empted Under The *Garmon* Doctrine Conflicts With The Decisions Of This Court And Other Courts Of Appeals.

In order to preserve the exclusive jurisdiction of the National Labor Relations Board over claims relating to conduct regulated by the National Labor Relations Act, this Court held in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244-245 (1959), that state regulation of conduct arguably within the realm of the Board is pre-empted by the Act:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act,

> or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.
>
> * * * * *
>
> When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

As the Court only recently emphasized in *Longshoremen* v. *Davis*, 476 U.S. at 389-390, even in ambiguous cases in which it is not "clear whether the particular activity regulated by the States [is] governed by § 7 or § 8 * * * 'courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the * * * Board.' " See also *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877, 1883 n.8 (1988).

The court of appeals' ruling runs roughshod over the *Garmon* pre-emption doctrine. To begin with, it incorrectly reads this Court's decision in *Davis* as abolishing the "arguably prohibited" branch of *Garmon* by providing that a party asserting pre-emption must assert a claim that the Board could decide *in its favor.* In addition, the court below improperly took it upon itself to decide an issue that is "at the heart of the Board's function": whether the eligibility of existing employees for future employment is a mandatory subject of bargaining. Both aspects of the court of appeals' *Garmon* analysis require this Court's review.[2]

---

[2] Because the *Garmon* pre-emption aspects of the court of appeals' decision implicate the jurisdiction of the National Labor Relations Board and the scope of the federal enactment, the Court may wish to request the views of the Solicitor General before it decides whether to grant this petition.

A. The Court Of Appeals Has Misinterpreted This Court's *Davis* Decision To Effectively Abolish The "Arguably Prohibited" Branch Of *Garmon*.

In support of its assertion that respondents' claims were pre-empted under *Garmon*, GM argued that those allegations, if true, amounted to claims that the company had circumvented the union and bargained directly with employees (by offering them an "inducement" it had not offered at the bargaining table) and that it had deceived the union and thus failed to bargain in good faith. The court of appeals acknowledged that circumventing the union would violate Section 8(a)(5) of the Act, but it held that under *Davis* state regulation of conduct arguably prohibited by the NLRA is no longer pre-empted (App., *infra*, 9a; emphasis in original):

> By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claims could not reasonably be *upheld* by the Board.

The court below read *Davis* in a startling and unprecedented way: as eliminating the "arguably prohibited" branch of *Garmon* by concluding that a party's assertion that its own conduct (as alleged by its opponent) arguably *violated* the Act is not sufficient to require pre-emption because it is not a claim that could "reasonably be *upheld* by the Board." *Ibid.*

The court of appeals' interpretation of *Davis* is plainly incorrect. Contrary to the broad reading given it by the court below, *Davis* merely defined the term "arguably." The Court held that, to sustain its burden of showing that a claim involves conduct that is "arguably" prohibited or protected by the NLRA, "a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board." 476

U.S. at 395. The party must show "that the Board reasonably could uphold a claim based on such an interpretation." *Ibid.* In other words, *Davis* requires the party asserting *Garmon* pre-emption to do more than articulate a farfetched theory under which there would be a remote possibility that the Board would find its conduct prohibited or protected.

The erroneous construction of *Davis* adopted by the court of appeals would have widespread and unfortunate consequences not even remotely contemplated by this Court. By abolishing the "arguably prohibited" branch of *Garmon*, it would open the door to wholesale state regulation of conduct that Congress intended to be regulated only through the NLRB. In fact, the court of appeals' reformulation of *Garmon* would not be met even in cases where the conduct alleged was *actually* (rather than arguably) prohibited by the Act. This Court's subsequent reiteration of the "arguably prohibited" branch in *Lingle*, 108 S. Ct. at 1883 n.8, makes clear that it does not interpret *Davis* as the Fifth Circuit did.

Moreover, the court of appeals' interpretation directly conflicts with the decisions of several other courts of appeals that have recently applied the "arguably prohibited" branch of the *Garmon* doctrine to pre-empt claims similar to those of respondents. In *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989), for example, several laid-off employees sued their employer claiming that the company had fraudulently represented that it would keep a plant open in return for certain concessions from the union. The Eleventh Circuit upheld the company's argument that the employees' claims were pre-empted because the alleged conduct was arguably prohibited by Section 8(a)(5). 855 F.2d at 1515-1518. Similarly, in *Kolentus* v. *Avco Corp.*, 798 F.2d 949, 960-962 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987), the Seventh Circuit agreed with an employer that nearly identical state

law fraud claims were pre-empted, reasoning that "[a] state law claim presumptively is preempted where the unlawful activity charged actually or arguably constitutes an unfair labor practice under the NLRA." See also *Overby* v. *Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989) (citing *Davis* and remanding to the district court to determine whether plaintiffs' claims involved conduct that was arguably prohibited by the Act).

This Court should grant review to resolve the conflict among the circuits on this basic and frequently recurring labor law issue.

B. The Court Of Appeals Improperly And Incorrectly Decided That Future Eligibility For Employment Is Not A Mandatory Subject Of Bargaining.

In addition to contending that respondents' allegations amounted to a claim that it circumvented and deceived the union and thus failed to bargain in good faith, GM argued below that the issue of future employment eligibility is a term and condition of employment and thus a mandatory subject of bargaining. Respondents' allegations therefore amounted to a claim, plainly pre-empted by the NLRA, that GM unilaterally modified a mandatory subject without bargaining with the union. The court of appeals rejected GM's pre-emption argument on the basis of its own determination that the eligibility of present employees for future employment is *not* a mandatory subject of bargaining. App., *infra*, 6a-7a.

The court of appeals' approach once again blatantly disregards the *Garmon* framework. The court below should not have decided independently whether future employment eligibility is a term and condition of employment; instead, it should have asked whether GM's contention that it is a mandatory subject of bargaining was "an interpretation of the Act that is not plainly contrary to

its language and that has not been 'authoritatively rejected' by the courts or the Board." *Davis*, 476 U.S. at 395. As this Court has noted, "[c]onstruing and applying the duty to bargain and the language of § 8(d), 'other terms and conditions of employment,' are tasks lying at the heart of the Board's function." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979).

The court of appeals cited two cases in support of its holding, but neither amounts to an authoritative rejection of GM's assertion that future eligibility is a mandatory subject of bargaining. In *Ford Motor Co.* v. *NLRB*, this Court upheld the Board's determination that the price of food in an in-plant cafeteria *is* a mandatory subject of bargaining and is not "among those 'managerial decisions, which lie at the core of entrepreneurial control.' " 441 U.S. at 498. The court below did not explain how that statement warranted the conclusion that eligibility for future employment *does* "lie at the core of entrepreneurial control." The court of appeals also cited Justice Stewart's concurring opinion in *Fibreboard Corp.* v. *NLRB*, 379 U.S. 203, 222 (1984); that decision upheld a Board ruling that the contracting out of bargaining union work under certain conditions is a mandatory subject of bargaining. Again, it is not at all clear how that supports the court of appeals' ruling.

In actuality, the Board and the courts have consistently supported GM's position that future employment eligibility is a mandatory subject of bargaining. The Board has long held that the rights of laid off employees to be recalled (and the terms and method of recall) are mandatory subjects of bargaining. *Master Slack Corp.*, 230 NLRB 1054, 1055 (1977), enforced, 618 F.2d 6 (6th Cir. 1980). *United States Gypsum Co.*, 94 NLRB 112, 114-115 (1951), modified in other respects, 206 F.2d 410 (5th Cir. 1953), cert. denied, 347 U.S. 912 (1954). The label applied to the employee's separation—"termination" rather than

"layoff"—cannot be determinative of bargaining rights. Furthermore, this Court has held that although an employer need not bargain over its decision to close part of its business, it must bargain over the effects of such a decision on the terminated employees. *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 677 n.15 (1981). Among those effects are the "job security" rights of the employees being terminated (*id.* at 681), which include their rights to transfer or to bid on jobs that might open up with the company at a later time or at other locations. The court of appeals did not explain why an employer should be required to bargain over the job security rights of terminated employees following a plant closure or layoff, but not over whether its employees have any right to future employment after they have been "voluntarily terminated" in lieu of a layoff.

The court of appeals' resolution of this issue—reached without benefit of the Board's expertise—will have dramatic practical consequences well beyond the context of this case. It means that unions representing employees who are about to be terminated as part of a reduction in force have no right to bargain over the eligibility of those employees for reemployment. Although it is unquestionable that unions have the right to bargain over the reinstatement rights of laid off employees, once the layoff is characterized as a termination, under the court of appeals' view, unions (and the employees they represent) lose all bargaining rights. And this is so even though the union seeks to bargain before the employees are terminated pursuant to a voluntary termination agreement. It may indeed be the case that evaluation of completely *new* applicants for employment "lies at the very core of entrepreneurial control," but that does not mean that *existing* employees have no right to bargain over their future reemployment.

The court of appeals' conclusion is fundamentally at odds with the important federal policy favoring resolution of disputes through peaceful bargaining. It is also plainly contrary to the ways in which the Board and the courts have handled other questions involving layoffs and plant closings. But even if that were not the case, the Fifth Circuit's determination was not one for a court to make in the first instance. Deciding whether future employment eligibility of existing employees is a mandatory subject of bargaining is a "task[ ] lying at the heart of the Board's function." *Ford Motor Co.*, 441 U.S. at 497. The court of appeals accordingly should have held that respondents' state law claims were pre-empted and should have left this important question for the Board to resolve in the first instance.[3]

II. The Court Of Appeals' Decision That Respondents' Claims Were Not Pre-empted By Section 301 Of The LMRA Conflicts With Decisions Of Other Courts Of Appeals And With This Court's Repeated Admonition That Disputes Relating To The Terms Of Collective Bargaining Agreements Must Be Resolved Solely Under Federal Law.

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, creates federal jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce * * *." In *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957), this Court held

[3] In a footnote, the court of appeals stated that GM's duty to bargain over future eligibility "did not arise in the absence of * * * a demand [for bargaining.]" App., *infra*, 7a n.6. But as the court acknowledged, the union *did* raise the issue of employment eligibility at the bargaining table and supposedly was "told that would be 'no problem.' " App., *infra*, 3a. It thus can hardly be maintained that the union did not seek to bargain on the issue.

that Section 301 is not merely a jurisdictional statute; rather it "expresses a federal policy that federal courts should enforce [collective bargaining] agreements" and that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 455, 456. Thus, in defining rights and responsibilities in the labor context, "[f]ederal interpretation of the federal law will govern, not state law." *Id.* at 457.

The Court elaborated on this rule in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 103 (1962), which held that "[t]he dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." Disputes about the meaning of a collective bargaining agreement cannot be left to state law because "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' " *Ibid.* As the Court explained, "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Ibid.* "[I]n enacting § 301," therefore, "Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Lucas Flour*, 369 U.S. at 104. Indeed, the "preemptive force of § 301 is so powerful as to displace entirely *any* state cause of action" that contends, explicitly or implicitly, than an employer breached its obligations under a labor contract. *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983) (emphasis added).

This Court recently had occasion to apply these principles in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985). In *Lueck*, an employee subject to a collective bargaining agreement brought a state law tort suit contending that his employer "intentionally, contemptuously, and

repeatedly failed" to make disability insurance payments under a union-negotiated disability plan. *Id.* at 206. The Wisconsin Supreme Court rejected the employer's argument that federal law pre-empted the employee's state law cause of action, holding that the employee's suit did not arise under Section 301 of the LMRA because "[u]nder Wisconsin law, the tort of bad faith is distinguishable from a bad-faith breach-of-contract" and "is independent of that contract." *Id.* at 207. In the court's view, "violation of the labor contract was 'irrelevant to the issue of whether the defendants exercised bad faith in the manner in which they handled Lueck's claim.' " *Ibid.*

This Court unanimously reversed. The Court observed that "[i]f the policies that animate § 301 are to be given their proper range, * * * the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." 471 U.S. at 210. As the Court explained (*id.* at 211):

> [Q]uestions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

If state law were permitted to determine the consequences flowing from particular contract terms, "[t]he parties would be uncertain as to what they were binding themselves to" when they entered into the labor contract. *Ibid.* Such a result would make it "more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Ibid.*

In light of these concerns, the Court in *Lueck* announced the governing test for pre-emption under Section 301: a state law claim is pre-empted whenever it "is inextricably intertwined with consideration of the terms of the labor contract" (471 U.S. at 213), such that "any attempt to

assess liability * * * inevitably will involve contract interpretation." *Id.* at 218. In other words, whenever "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

Applying that test, this Court rejected the Wisconsin Supreme Court's conclusion that the state law tort claim could be resolved without interpreting the collective bargaining agreement. The state court's assertion that the labor contract was irrelevant to the tort claim was "based * * * not solely on its unassailable understanding of the state tort, but also on assumptions about the scope of the contract provision which it had no authority to make under state law." The Wisconsin court "evidently assumed that the only obligations the parties assumed by contract are those expressly recited in the agreement." But "[t]he assumption that the labor contract creates no implied rights is not one that state law may make." 471 U.S. at 214-215.

Moreover, the language of the collective bargaining agreement and the nature of the employee's tort claim made the Wisconsin court's assumption that there were no implied rights "highly suspect." The bad-faith handling claim "intrinsically relates to the nature and existence of the contract." 471 U.S. at 216. Clearly, "[t]he duties imposed and rights established through the state tort * * * derive from the rights and obligations established by the contract." *Id.* at 217. In these circumstances, the employee's claims "must be evaluated by federal contract law." *Ibid.*

The Court reiterated these same concerns in *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988). In that case, an employee alleged that she had been discharged in retaliation for filing a workers' compensation

claim. The Court held that the state law claim contesting her discharge was not pre-empted by Section 301 even though the employee was covered by a collective bargaining agreement that required "just cause" for discharge. The fact that the plaintiff may have had a "remedy [under the labor contract] for conduct that coincidentally violates state law does not make the *existence* or the contours of the state law violation dependent upon the terms of the [labor] contract." *Id.* at 1885 (emphasis added).

The Court emphasized that its holding in *Lingle* should not be interpreted to allow state law to determine questions relating to the terms of collective bargaining agreements. "Today's decision should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm; judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective-bargaining agreements." 108 S. Ct. at 1884.

A. The Court Of Appeals Erred In Deciding That Respondents' Claims Were Not Pre-empted By Section 301.

The court of appeals' conclusion that respondents' state law fraud and misrepresentation claims were not pre-empted by Section 301 cannot be reconciled with this Court's decisions. To begin with, it is beyond dispute that respondents' claims owe their existence to the VTEP Agreement. They allege that GM falsely represented that "employees who had accepted VTEP benefits * * * would be given preference over other applications for employment" and that they "would be eligible for employment at [GM's] other locations on the same basis as other applicants." App., *infra*, 46a. No matter how respondents (or the court of appeals) may choose to characterize these claims, at bottom they allege that as part of the VTEP settlement (which is governed by the VTEP Agreement),

GM promised that respondents would be eligible for future employment, either on a preferential basis or on the same terms as other applicants. Thus, the very "existence [as well as] the contours of the state law violation [are] dependent upon the terms of the [VTEP] contract" (*Lingle*, 108 S. Ct. at 1885); respondents' state law claim "intrinsically relates to the nature and existence of the contract." *Lueck*, 471 U.S. at 216. *Lueck* and *Lingle* thus require a finding of pre-emption.

Furthermore, the Fifth Circuit's finding of no pre-emption must also rest on the questionable assumption that the VTEP Agreement created no *implied* rights regarding future employment eligibility. Even though the VTEP Agreement alluded to the possibility of reemployment in its provisions relating to overpayment and repayment of benefits, and even though the parties negotiated over the "rehire rights" of VTEP beneficiaries, the court below "evidently assumed that the only obligations the parties assumed by contract are those expressly recited in the agreement." *Lueck*, 471 U.S. at 214. But in this case, as in *Lueck*, "[t]he assumption that the labor contract creates no implied rights is not one that state law may make." *Id.* at 215. Indeed, in light of several specific terms of the VTEP Agreement, the court of appeals' assumption of no implied rights related to reemployment is, as in *Lueck*, "highly suspect." *Ibid.*

B. The Circuits Are In Conflict Over Whether Extra-Contractual Promises Made To Bargaining Unit Employees Can Be Enforced Under State Law.

The court of appeals held that respondents' fraud and misrepresentation claims were not pre-empted by Section 301 because they related to "an extraneous promise concerning their future employment eligibility" rather than the terms of the VTEP Agreement. As discussed above, that characterization of respondents' claims is "highly

suspect" and rests on assumptions about implied contractual rights that state law is not permitted to make. But even if the court of appeals' characterizations were correct, this case would still warrant further review.

The courts of appeals are hopelessly divided on the frequently recurring issue of whether Section 301 pre-empts state law fraud and misrepresentation claims based on alleged "extraneous" promises relating to the terms and conditions of employment of workers covered by collective bargaining agreements. The Third and Eighth Circuits agree with the Fifth Circuit that such claims are not pre-empted. In *Berda* v. *CBS Inc.*, 881 F.2d 20 (3d Cir. 1989), petition for cert. pending, No. 89-589, a former CBS employee alleged that the company had told him before he was hired that "he would be guaranteed employment with CBS for the reasonably foreseeable future." 881 F.2d at 21. When he was laid off, the employee filed suit in state court, claiming that CBS had breached an oral contract and that it had committed fraud and negligent misrepresentation under state tort law. The Third Circuit, which characterized the case as involving a "circuit-splitting question" (881 F.2d at 20), held that the employee's tort claims were not pre-empted by Section 301 because "Berda was not required to refer to the collective bargaining agreement in order to state his tort claim." *Id.* at 27.

The Eighth Circuit reached the same conclusion in *Anderson* v. *Ford Motor Company*, 803 F.2d 953 (1986), cert. denied, 483 U.S. 1011 (1987). The plaintiffs were former Ford employees who alleged that Ford assured them when they were hired that they would not be bumped by laid-off employees from other plants around the country. After the employees were bumped, they brought suit, contending that Ford's representations were fraudulent or negligent. The Eighth Circuit held that the tort claims were not pre-empted. The Court acknowledged that the

Ninth Circuit had reached the opposite conclusion on similar facts (*Bale* v. *General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986)), but held that "we do not agree with [the Ninth Circuit] that adjudication of these state law claims requires any significant reference to the terms of the collective bargaining agreement." 803 F.2d at 959.

The Ninth and Eleventh Circuits, on the other hand, have held that such claims *are* pre-empted by Section 301. In *Young* v. *Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), an employee claimed that the company assured her when she was hired that she could be discharged only for just cause, even though under the collective bargaining agreement she would be classified as a probationary employee subject to discharge at the company's discretion. When the employee was fired without apparent cause, she brought suit, alleging fraud and misrepresentation. The Ninth Circuit held that her claims were pre-empted by Section 301. "Because any 'independent agreement of employment * * * could be effective only as part of the collective bargaining agreement,' the CBA controls and the contract claim is preempted." 830 F.2d at 997. See also *Chmiel* v. *Beverly Wilshire Hotel Co.*, 873 F.2d 1283, 1285-1286 (9th Cir. 1989) (employee's claim that he was promised that he would not be discharged without cause during probationary period pre-empted by Section 301); *DeLapp* v. *Continental Can Co.*, 868 F.2d 1073, 1074-1076 (9th Cir. 1989) (employee's claim that employer promised him while he was a member of the bargaining unit that if he remained on the job for three extra months he would be eligible for early pension pre-empted by Section 301).

The Eleventh Circuit's approach to the issue of "extraneous promises" focuses on whether the promise was made when the employee was a member of the bargaining unit. If the state law suit alleges a pre-employment promise, the action is not pre-empted by Section 301. *Varnum* v.

Nu-Car Carriers, Inc., 804 F.2d 638, 640 (11th Cir. 1986), cert. denied, 481 U.S. 1049 (1987). But if the promise was made to employees who were members of the bargaining unit, the state law claims are pre-empted. *Darden* v. *United States Steel Corp.*, 830 F.2d 1116, 1119-1120 (11th Cir. 1987); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986); *Redmond* v. *Dresser Indus.*, 734 F.2d 633 (11th Cir. 1984). The Eleventh Circuit would thus agree with the Third and Eighth Circuit decisions in *Berda* and *Anderson* and with the Ninth Circuit in *DeLapp* (and would disagree with the Ninth Circuit in *Young* and *Bale*), but it would disagree with the Fifth Circuit in this case because respondents "were clearly employees within the meaning of the collective bargaining agreement when the alleged misrepresentations, which constitute the crux of their complaints, were made to them." *Darden*, 830 F.2d at 1119.

Berda, *Anderson*, *Young* and *Varnum* present facts analogous in some respects to those of *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987). In *Caterpillar*, this Court held that state law claims for breach of individual employment contracts were not "completely pre-empted" by Section 301 and thus were not removable to federal court. The individual contracts were allegedly made before the employees became members of the bargaining unit and thus before they were covered by any collective bargaining agreement. In this case, by contrast, as well as in the Eleventh Circuit's decision in *Darden* and the Ninth Circuit's decision in *DeLapp*, the alleged promises were made while respondents *were* members of the bargaining unit subject to the labor contract. Unlike *Caterpillar*, therefore, this case, *Darden* and *DeLapp* do "address the relationship between the individual [alleged promise] and the collective agreement." *Caterpillar*, 482 U.S. at 395. Whatever the status of pre-hire individual contracts after *Caterpillar*, a difficult issue—and a clear conflict—still

exists as to the pre-emption of state law claims relating to individual promises allegedly made while the employees were members of the bargaining unit.

It is essential that this Court resolve the conflict. Disputes between employers and employees are commonplace, and it would be the rare employee who could not package his complaint as an "independent" state law cause of action by alleging "extraneous promises" relating to—if not directly governed by—the terms of a collective bargaining agreement. As a result, state law claims will continue to proliferate until this Court clarifies the governing principles. Nothing could be more destructive of the goals Congress sought to achieve in enacting Section 301 than a rule facilitating attempts by individual employees to make end runs around the terms of collectively bargained agreements and around contractual dispute resolution mechanisms. Unfortunately, the Fifth Circuit's decision in this case—by disregarding the pre-emptive effect of Section 301—offers a blueprint for evasion of the congressional scheme.

III. The Court Of Appeals' Decision That GM's Severance Pay Plan Was Not An Employee Benefit Plan Within The Meaning Of ERISA Conflicts With Decisions Of Other Courts And Is Contrary To The Policies Underlying The Statute.

In Section 514(a) of ERISA, 29 U.S.C. § 1144(a), Congress established the broad pre-emptive effect of federal regulation of employee benefit programs:

> Except as provided in subsection (b) of this section [listing exceptions not relevant to this case], the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

The pre-emptive force of ERISA is thus "deliberately expansive" and designed to make regulation of employee benefit plans " 'exclusively a federal concern.' " *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987) (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)).

It is beyond dispute that the VTEP benefits are "employee benefits" within the meaning of ERISA.[4] Nevertheless, the court of appeals concluded that the VTEP was not an "employee benefit *plan*" governed by ERISA. Relying on this Court's decision in *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), the court below held that "[t]he [VTEP] plan was not ongoing, nor was there any need for continuing administration of the payment program (though employees could elect a two-year installment payment option)." App., *infra*, 20a. The court of appeals' rationale cannot survive careful scrutiny and would have substantial adverse consequences well beyond the context of this case.

In *Coyne*, the Court held that a Maine statute requiring employers to make severance payments in designated amounts in the event of a plant closing "neither establishes, nor requires an employer to maintain, an employee benefit *plan*." 482 U.S. at 12 (emphasis in original). The Court described an ERISA "plan" as involving "an ongoing administrative program to meet the employer's obligation" (*id.* at 11) and held that while "[s]ome severance benefits by their nature necessitate" such an administrative program, the Maine law's "requirement of a one-time, lump-sum payment triggered by a single event" was not (and did not require) such a program. *Id.* at 18.

This limited holding, involving a statutory lump-sum benefit requirement, does not support the court of appeals'

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[4] See *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 7 (1987); 29 U.S.C. § 1002(1)(B).

conclusion that GM's very different VTEP program was not an employee benefit plan. The Fifth Circuit's analysis, which would apply to *all* severance benefit programs enacted to accommodate a particular event, ignores the nature of the VTEP program and the fundamental differences between the VTEP and the Maine plant closing law. To begin with, the VTEP was not a state-imposed benefit, but a benefit plan negotiated between an employer and a union representing its employees. Moreover, as the VTEP Agreement plainly indicates, the GM program clearly contemplated an administrative scheme. Not all employees could elect VTEP benefits; the program was limited to 450 employees who had to apply for the benefits. Management retained discretion in selecting among the applicants and in the timing of the termination, with seniority governing between equal employees. The benefit amount also depended on seniority, and employees could elect between a lump-sum payment and a larger benefit to be paid out *over two years*. The VTEP Agreement established a procedure for resolving disputes and for collecting overpayments and gave employees the option to return the benefit within 14 days and to resume employment. The VTEP program thus *required* and *included* an administrative scheme. It is precisely the kind of employee benefit plan regularly governed by ERISA.

The court of appeals' decision not only means that ERISA does not pre-empt state law actions relating to severance plans like the VTEP; it also means that the entire, carefully constructed regulatory framework of ERISA is inapplicable to such plans. The reporting and disclosure requirements, the fiduciary responsibility provisions, the detailed statutory mechanism for administration and enforcement—all of these provisions do not apply to VTEP and similar severance benefit plans. Accordingly, the court of appeals' decision would strip countless employees of im-

portant statutory protections thought to have been in place since 1974.

In light of the language of the statute and Congress's clear intent to provide broad protection to employees, it is hardly surprising that the other courts of appeals to consider the issue have held that plans similar to the VTEP are employee benefit plans covered by ERISA. The only other court of appeals to decide the issue since *Coyne* is the Third Circuit. In *Pane* v. *RCA Corp.*, 868 F.2d 631 (1989), the court held that a severance benefit program was an employee benefit plan under ERISA and that a state law suit relating to that program was therefore pre-empted. The RCA plan was similar to GM's VTEP: it applied to a limited number of employees, involved considerable management discretion, and was instituted by the company (not the state) to deal with a single anticipated set of job terminations. *Id.* at 633.

On these similar facts, the Third Circuit—expressly applying *Coyne*—held that RCA's employee benefit plan "required an administrative scheme" and was subject to ERISA. 868 F.2d at 635. The court thus reached a result directly contrary to that of the Fifth Circuit in this case.[5] Prior to this Court's decision in *Coyne*, several other courts of appeals had also held that similar severance benefit programs were covered by ERISA. *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985) (promise of severance pay in connection with sale of refinery);

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[5] At least two other courts subsequent to *Coyne* have held that similar severance benefit plans are covered by ERISA. See *Kocman* v. *Safeguard Business Systems*, Civ. A. No. 88-5127 (E.D. Pa. June 28, 1989); *Babcock & Wilcox Co.* v. *Illinois Human Rights Comm'n*, 545 N.E.2d 799 (Ill. App. Ct. 1989). One court reached the same conclusion before *Coyne* on facts nearly identical to those of this case. *Muenchow* v. *Parker Pen Co.*, 615 F. Supp. 1405, 1416-1419 (W.D. Wis. 1985).

Blau v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir. 1985) (separation allowance program triggered by reorganization, consolidation, or elimination of operations); *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (severance policy adopted in anticipation of large-scale layoffs).

This Court should grant review to clarify the scope of its *Coyne* decision, to resolve the conflict among the circuits on a significant issue of federal law, and, most importantly, to make clear that severance benefit plans, even if they are instituted in anticipation of a single set of job terminations, are subject to ERISA regulation. The court of appeals' decision would have far-reaching consequences beyond the pre-emption context and would leave employees, employers, and benefit plan administrators in an intolerable state of uncertainty as to whether severance benefit programs must comply with ERISA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

MARY R. WELLS, et al.,
Plaintiffs-Appellees,

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellant.

No. 88-4665

United States Court of Appeals,
Fifth Circuit

August 24, 1989

Appeal from the United States District Court for the Southern District of Mississippi.

Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

We review here another case involving alleged promises made and broken in the highly-charged environment of large-scale layoffs and shifts in the labor market.[1] The thirty-two plaintiffs in this action are former employees

[1] E.g., *Cefalu* v. *B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) (promise concerning availability of retirement benefits after employer's sale of assets to another company); *Degan* v. *Ford Motor Co.*, 869 F.2d 889 (5th Cir. 1989) (promise concerning availability of early retirement benefits for employee who, during plant closure, accepted severance pay); *Bache* v. *American Tel. & Tel. Co.*, 840 F.2d 283 (5th Cir.) (promise of job security following reorganization and divestment of subsidiaries), cert. denied, ____ U.S. ____, 109 S. Ct. 219, 102 L.Ed.2d 210 (1988).

at the Packard Electric plant, a subsidiary of General Motors Corporation ("GM"), in Clinton, Mississippi. When GM announced layoffs in 1983, it negotiated with the union a separation agreement, according to which employees could opt for a severance payment in lieu of preserving their seniority and rehire rights. At meetings to explain the plan, a GM representative allegedly told the employees that they could be rehired if new jobs were created, although they would have to apply like everyone else. Plaintiffs contended that when new positions opened in 1985, management informed them they were ineligible under the severance plan.

The plaintiffs sought redress in the district court, basing jurisdiction upon diversity, and positioning their claims upon theories of state law fraud and misrepresentation. GM moved for summary judgment on the ground that the district court lacked subject matter jurisdiction since the proper forum was the National Labor Relations Board ("NLRB" or "Board"). In the alternative, GM claimed that plaintiffs' state law claims were preempted by federal law. The district court denied the motion and certified the question for interlocutory appeal. We accepted the case for review and now affirm, holding that the NLRB has no jurisdiction and that state law governs the action.

I. Right To Be Considered For Rehire.

In 1982, demand for domestic automobiles began to slump, resulting in planned layoffs at the Packard Electric plant ("the plant"). A committee comprised of both union and management created the Voluntary Termination of Employment Plan (the "VTEP"), offering severance pay, either in lump-sum or two-year installment payments, to those who agreed to resign. This much the parties

agree upon; they differ with respect to GM's position concerning the future employment eligibility of those who opted for the VTEP.

GM's version of the facts contradicts that of the plaintiffs and their union in every important respect. GM contends that the parties raised the issue of "rehire rights" in bargaining over the VTEP and that GM officials specifically told union representatives that employees opting for VTEP would not be eligible for rehire. Plaintiffs and their union claim that the representatives asked about future eligibility and were told that would be "no problem." GM alleges that during collective bargaining over the plan's details, management negotiators told union negotiators that employees who accepted plan benefits would not be eligible for rehire. GM further contends that when its officials presented the plan to the employees, they told the employees that those accepting plan benefits would be ineligible for rehire. Lastly, GM reads the VTEP itself as "vague" and "ambiguous" on the issue of employee eligibility for rehire.

Plaintiffs would explain the differing factual accounts as a semantic miscue: GM's references were to "rehire rights," a term of art as between the parties that denotes those rights held by laid-off employees under the general collective bargaining agreement. Such rehire rights would include the rights of laid-off employees to be called back in a certain priority, to have their seniority and benefits reinstated, to work at a particular wage level, and so forth. In contrast, plaintiffs assert that the issue of "future employment eligibility" was independent of the discussion of rehire rights, concerned only the potential for those who opted for VTEP of ever being GM employees again, and was *not* the subject of collective bargaining.

Plaintiffs, who are thirty-two former GM employees who opted for VTEP, brought independent actions in federal district court, premising jurisdiction upon diversity and alleging (1) that GM, when presenting the VTEP to employees, offered false inducements to employees to opt for the VTEP, in the form of promises concerning future employment eligibility; (2) that GM knew these inducements and representations were false; (3) that plaintiffs relied upon these representations in accepting the plan; and (4) that plaintiffs were injured as a result of this reliance.

II. Subject Matter Jurisdiction: Is This a Case for the NLRB?

Congress vested exclusive jurisdiction in the NLRB over conduct that is "arguably protected or arguably prohibited" by Sections 7 and 8 of the NLRA. See *International Longshoremen's Ass'n* v. *Davis*, 476 U.S. 380, 394, 106 S. Ct. 1904, 1914, 90 L.Ed.2d 389 (1986).[2] These sections protect the right of the employees to engage in collective bargaining and prohibit both management and labor from engaging in the enumerated unfair labor practices. 29 U.S.C. §§ 157, 158. GM bears the burden of showing that the challenged conduct is arguably protected or prohibited by the NLRA. See *Davis*, 476 U.S. at 395, 106 S. Ct. at 1914. It presents three arguments designed to meet this burden and invoke NLRB jurisdiction. We deal with each argument in turn, reviewing them as did the district court; that is, after examining the record *de novo* we resolve all reasonable doubts and draw all reasonable inferences in favor of the non-movant, and then determine

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[2] Citing *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 244, 79 S. Ct. 773, 779, 3 L.Ed.2d 775 (1959).

whether the movant is entitled to judgment as a matter of law. *Schuster* v. *Martin*, 861 F.2d 1369, 1371 (5th Cir. 1988).

A. Mandatory Subjects Of Bargaining.

First, GM contends that future employment eligibility is a mandatory subject of bargaining under 29 U.S.C. § 158(d); hence, plaintiffs' claims about GM's representations necessarily implicate GM's good faith in bargaining, or in failing to bargain,[3] over the future-employment issue. GM also asserts that its conduct was arguably prohibited or protected by the NLRA because Section 8(a)(5) requires employers to bargain with union representatives before modifying policies that affect mandatory subjects of bargaining. See *Armour & Co.*, 280 NLRB 824, 826 (1986).[4]

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[3] Included within GM's good-faith bargaining obligation is the duty to provide adequate information about the subject at issue so that the negotiation process can function properly. See *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152, 76 S. Ct. 753, 755, 100 L.Ed. 1027 (1956) ("Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims."); *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1286-87 (6th Cir. 1986). Thus, to the extent, if any, that GM "hid the ball" in the VTEP negotiations by keeping silent about its intentions concerning employee eligibility for rehire, it would not have bargained in good faith.

[4] In *Armour* the Board held that the employer's decision whether to allocate severance pay and vacation pay to weeks following the employee's termination date—which would result in making the employee ineligible for unemployment compensation in Wisconsin during that period—was a mandatory subject of bargaining. Contrary to GM's recitation of the holding in *Armour*, the Board did not declare that "the power to allocate * * * rested exclusively within the authority of the employer in the sense that it was a traditional management prerogative." Instead, the Board's point was that, *vis-a-vis the state*, the employer's authority to allocate vacation and sev-

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The district court assumed *arguendo* that the VTEP was a mandatory subject of bargaining, such that GM had a duty to bargain with union representatives over the VTEP.[5] But the court concluded that the issue of future eligibility for rehire was not, in itself, a mandatory subject of bargaining so as to require GM to engage in bargaining over that issue as well: "The fact that the matter at issue here, eligibility for future employment, in retrospect could have been and perhaps should have been included within [the VTEP] does not render that topic *a fortiori* a mandatory subject of bargaining."

We agree. As plaintiffs observe, the company's evaluation and consideration of individual applicants for employment lies "at the very core of entrepreneurial control." The Supreme Court has held that these types of managerial decisions are not mandatory subjects of bargaining. See *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 498, 99 S. Ct. 1842, 1849, 60 L.Ed.2d 420 (1979) (quoting *Fibreboard Paper Prods. Corp.* v. *NLRB*, 379 U.S. 203, 222, 85 S. Ct. 398, 409, 13 L.Ed.2d 233 (1964) (Stewart, J., con-

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[4] *continued*
erance pay on unemployment compensation forms gave it meaningful authority over the payment of unemployment compensation and hence, the ability to debase or enhance the worth of severance and vacation pay. The Board therefore did not imply that this authority was an exclusive management prerogative, *vis-a-vis the workers*; by holding that the employees were entitled to have their say in that decision, the Board concluded that it was not an exclusive prerogative.

[5] The court supported this assumption with citations to labor cases involving disputes over the status of similar subjects of bargaining such as pension plans and severance pay. See *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L.Ed.2d 341 (1971); *Armour*. We make no comment on the correctness of this assumption, as the issue is not before us: Here, the union and management indeed collectively bargained over the VTEP.

curring)). An employer's failure or refusal to bargain over a non-mandatory subject does not violate Section 8(a)(5).[6] See *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349, 78 S. Ct. 718, 722, 2 L.Ed.2d 823 (1958).

Thus, the fact that future eligibility for rehire might, in the context of the VTEP, have an economic value for those workers who accepted the plan, or that GM raised the issue during collective bargaining (a claim which plaintiffs contest), does not transmogrify a management prerogative into a mandatory subject of bargaining. The status of the issue of future eligibility does not change by virtue of its relation to, or even its purported inclusion in, a union-management agreement concerning other mandatory subjects of bargaining. See *Wooster*, *id.* As plaintiffs note, to hold otherwise would provide both management and labor with a "bootstrap" with which to make any bargaining subject a mandatory one.

B. Bargaining Directly With Employees.

Section 8(a)(5) of the NLRA requires employers to bargain in good faith with employee representatives. We have read that section to preclude employers from circumventing those representatives by bargaining directly with em-

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[6] Moreover, if, as GM contends, future employment eligibility were a mandatory subject of bargaining by virtue of its value in the context of the VTEP, then the duty to bargain over that separate subject was not triggered unless and until there was a clear and unequivocal demand for bargaining by the union. See *NLRB* v. *Katz*, 369 U.S. 736, 743, 82 S. Ct. 1107, 1111, 8 L.Ed.2d 230 (1962) ("A refusal to negotiate *in fact* as to any subject that is within § 8(d), *and about which the union seeks to negotiate*, violates § 8(a)(5)" (emphasis added)). Hence, even if we accepted GM's argument that future eligibility itself was a mandatory subject of bargaining, GM's duty did not arise in the absence of such a demand.

ployees. See *Standard Fittings Co.* v. *NLRB*, 845 F.2d 1311, 1317 (5th Cir. 1988). GM asserts that in making its representations to the group of employees who attended the VTEP meetings, it engaged in conduct "arguably prohibited" by the NLRA. Thus, GM maintains that the NLRB is the appropriate forum to hear even the claims of those whose conduct the Act arguably prohibits; in even more basic terms, the implication of GM's argument is that if its conduct indeed was wrong, it is the Board that should declare it so. We hold, however, that *Davis* defeats GM's attempt to invoke the NLRB's exclusive jurisdiction in this fashion.

In *Davis*, the Court gave the following construction to the phrase "arguably protected or prohibited":

> If the word 'arguably' is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board. The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

476 U.S. at 395, 106 S. Ct. at 1914 (citations omitted). GM contends throughout its brief that its positions on the status of future employment eligibility as a bargaining subject and on the propriety (or impropriety) of its representations to the employees were not ones which the Board or courts have rejected authoritatively. But that contention, even if accepted, does not bring us to a resolution, for as the Court explains in the passage quoted above, the party attempting to invoke the Board's jurisdiction must then demonstrate that the Board could rea-

sonably uphold that party's claim. The reason for this requirement is simple and instructive here: The exclusivity of the Board's administrative province, made necessary by the need for uniform treatment in labor disputes, may not serve as a shelter for those whose claims have no realistic chance of acceptance and no import for national labor policy. *Cf. Gray* v. *Local 714, Int'l Union of Operating Eng'rs*, 778 F.2d 1087, 1090 (5th Cir. 1985) (employee's claim for fraudulent inducement not preempted by NLRA because alleged conduct was of only "peripheral concern" regarding federal law).

By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claim could not reasonably be *upheld* by the Board.[7] Nor does GM convincingly demonstrate the import of its claim for national labor policy: As plaintiffs observe, the challenged conduct here was not an attempt on the part of GM to interfere with the collective bargaining process or to diminish the union's representative role; instead, it was a post-bargaining effort to induce individual employees to accept VTEP benefits. While not dispositive,[8] it

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[7] The same flaw is found in a similar argument made by GM, that is, that its failure to raise the issue of future employment eligibility amounted to a form of deception at the bargaining table and thus, a failure to bargain in good faith.

[8] GM correctly observes that an employer that makes unilateral decisions concerning mandatory subjects of bargaining violates § 8(a)(5) regardless of whether the employer makes those decisions during collective bargaining or attempts to implement them after the collective bargaining agreement has been ratified. *E.g., Standard Fittings*, 845 F.2d at 1315; *Huck Mfg. Co.*. v. *NLRB*, 693 F.2d 1176, 1186 (5th Cir. 1982); *N L Industries, Inc.* v. *NLRB*, 536 F.2d 786, 789-90 (8th Cir. 1976). Thus, had future employment

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is relevant that the parties had completed collective bargaining over the VTEP; GM's alleged inducements had no direct bearing upon the collective bargaining process in that they were not offered in order to obtain ratification of an agreement.[9] For better or worse, the bargaining process had served its function, and the union representatives had fulfilled their role. It was then left to the individual employees to choose whether they would opt for the plan, and it is upon that choice that GM's alleged inducements operated.

C. Sweet Promises.

Finally, GM would have us hold that its representations at the VTEP meetings were protected expression under Section 8(c) of the NLRA, which provides,

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice . . . if such expres-

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[8] *continued*

eligibility been a mandatory subject of bargaining included in the agreement, GM's attempt to make a unilateral change after ratification would have been a breach of its duty to bargain in good faith. Here, however, future eligibility was not a mandatory subject, nor is it GM's conduct in the collective bargaining process that is at issue; instead, it is the alleged inducement offered to the *individual employees* that is the source of plaintiffs' claims. As a result, adjudication of these claims under the rubric of state law presents little danger of subjecting the employer to conflicting substantive rules. See *Local 926, Int'l Union of Operating Eng'rs* v. *Jones*, 460 U.S. 669, 676, 103 S. Ct. 1453, 1458, 75 L.Ed.2d 368 (1983).

[9] Cf. *Serrano*, (employer allegedly made promises to keep coke plant open if steelworkers would accept and ratify concessions in addendum to collective bargaining agreement); *Parker* v. *Conners Steel Co.*, 855 F.2d 1510 (11th Cir. 1988) (same), cert. denied, ____ U.S. ____, 109 S. Ct. 2066, 104 L.Ed.2d 631 (1989).

> sion contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c). Here, GM's contention is that its representations at the meetings amounted only to a statement of fact about the VTEP: Employees who opted for the plan were not eligible for rehire.

We cannot accept this characterization of the facts in the current procedural posture of the case. As we explain below, we find no provision in the VTEP that reasonably might be construed as governing the dispute over future eligibility. Making all reasonable inferences in favor of plaintiffs, we must conclude that GM's representations went beyond a recitation of what was contained in the VTEP. Hence, we can only construe GM's statements as a promise of benefit over and above what the VTEP offered. As such, GM's statements were not protected expression under Section 158(c).

III. Preemption.

Holding as we do that the district court, and not the NLRB, had subject matter jurisdiction, we address GM's alternative claim that federal, rather than Mississippi, law governs this case.[10] GM premises its preemption claims

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[10] Plaintiffs' claims of fraudulent inducement are premised upon Mississippi common law. See *Berkline Corp.* v. *Bank of Miss.*, 453 So.2d 699, 702 (Miss. 1984), in which the Mississippi Supreme Court observed, "As all know . . ., running deep in our law is the notion that a person must respond where his statements or conduct reasonably induce another to rely to his detriment." The elements of a state law cause of action for fraud are set forth in *Martin* v. *Winfield*, 455 So.2d 762, 764 (Miss. 1984), as follows:

> (1) a representation, (2) its falsity, (3) its materiality, (4) the speaker's knowledge of its falsity or ignorance of its truth,

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upon both Section 301 of the LMRA and Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a). Though we agree with GM that the preemptive scope of these statutes is broad,[11] we conclude that it is not so broad as to reach this case.

A. Preemption Under Section 301.[12]

When resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between parties to a labor contract, the claim must be treated as a Section 301 claim. See *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 220, 105 S. Ct. 1904, 1915,

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[10] *continued*

(5) his intent that it should be acted upon by the person and in the manner reasonably contemplated, (6) the hearer's ignorance of its falsity, (7) his reliance on its truth, (8) his right to rely thereon, and (9) his consequent and proximate injury. [Citations omitted.]

[11] Under the *Avco* exception to the well-pleaded complaint rule, state law claims that implicate § 301 must be recharacterized as stating a federal cause of action. *Avco Corp* v. *Aero Lodge No. 735*, 390 U.S. 557, 560, 88 S. Ct. 1235, 1237, 20 L.Ed.2d 126 (1968); *Aaron* v. *National Union Fire Ins. Co.*, 876 F.2d 1157, 1161-62 (5th Cir. 1989). The Supreme Court has held that the *Avco* principle operates to "federalize" state law claims implicating ERISA benefit plans as well. See *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58, 65, 107 S. Ct. 1542, 1547, 95 L.Ed.2d 55 (1987).

[12] Section 301(a) provides,

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties . . . .

29 U.S.C. § 185(a).

85 L.Ed.2d 206 (1985).[13] But Section 301 is not implicated unless resolution of the state claim requires *interpretation* of a collective bargaining agreement. *Lingle* v. *Norge Div. of Magic Chef, Inc.*, ____ U.S. ____, 108 S. Ct. 1877, 1883, 100 L.Ed.2d 410 (1988). The Court declared in *Caterpillar Inc.* v. *Williams*, 482 U.S. 386, 396, 107 S. Ct. 2425, 2431, 96 L.Ed.2d 318 (1987), that "a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective-bargaining agreement" (emphasis in original).[14] Here, the district court concluded that no interpretation of the collective bargaining agreement or of the VTEP would be required in order to resolve the plaintiffs' claims.

GM presents a forceful argument that resolution of plaintiffs' fraudulent misrepresentation claims requires interpreting the terms of the collectively-bargained VTEP. Its claim is that in order to determine whether GM falsely represented the consequences of accepting the VTEP, there must be an examination and interpretation of the

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[13] In *Lueck*, the Court carefully delimited the scope of its ruling, writing that it did not hold "that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted by § 301." 471 U.S. at 220, 105 S. Ct. at 1915. We conclude that the instant claims, premised as they are upon independent state-created rights, present precisely the type of case which the Court excised from its holding by this language in *Lueck*.

[14] In an analogous ERISA case involving another employee at the Packard Electric plant, we recently held that the employee could litigate his state-law contractual rights in state court and that his claim was not preempted by ERISA. See *Hartle* v. *Packard Elec.*, 877 F.2d 354, 355-56 (5th Cir. 1989) (per curiam).

VTEP to determine what a *truthful* representation would have been. In such a case, it argues, preemption occurs. See *Lingle*.

However, GM's position is flawed in two important respects: First, it is not the case that Section 301 preemption occurs whenever a collectively-bargained agreement becomes relevant to a dispute of this nature; rather, the resolution of the particular dispute must be "*substantially* dependent upon analysis of the terms" of the collective bargaining agreement. *Lueck*, 471 U.S. at 220, 105 S. Ct. at 1915. Second, the argument rests upon an unsound premise: namely, that the plaintiffs' claim is that GM's representatives fraudulently misrepresented what was in the contract. Instead, as plaintiffs observe, their claim was that GM fraudulently *induced* individual employees to opt for the VTEP by making an extraneous promise concerning their future employment eligibility. They do not claim that the promise had anything to do with the *contents* of the VTEP.

Thus, plaintiffs urge that they are not relying upon any contract at all, but only upon an inducement that was separate and apart from the VTEP, was not covered by it, and was never a subject of negotiation. It is GM that claims, as a defense, that the contract contemplates, albeit not expressly, the circumstances that eventually occurred and therefore must be "interpreted" in order to resolve these claims.

But that is not a defense to a fraudulent-inducement claim in this context. The dispute is a highly fact-bound one concerning what was said, or promised, at the meeting. The defense to such a claim is not that "the VTEP might be construed to say otherwise"; rather, it is that "we made no such representation" or that "no such rep-

resentation could have been made given the VTEP's provisions."[15]

We recognize, as have other circuits, that the existence of an agreement nevertheless may invoke Section 301 preemption where a court determines that the agreement contains provisions that might reasonably be construed as governing the disputed matter.[16] The agreement might,

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[15] GM has given tacit recognition to the necessity of this defense by asserting before us that, in fact, the statement of GM's representative was the exact opposite of what plaintiffs claim he said, in other words, that he told employees that they would *not* be eligible for rehire if they opted for the VTEP.

[16] GM directs us to a number of cases, from other circuits, which it considers similar in fact to the instant case. The distinguishing characteristic of these cases, however, is that the subject agreements contained provisions that reasonably could be construed to govern the issue that had become the source of tension. See *e.g.*, *Darden* v. *United States Steel Corp.*, 830 F.2d 1116 (11th Cir. 1987) (per curiam) (laid-off employees with rehire rights were "employees" nonetheless and could not avoid obligation under collective bargaining agreement to bring their grievance to arbitration); *Bale* v. *General Tel. Co.*, 795 F.2d 775 (9th Cir. 1986) (contract definition of "temporary employee" governed dispute); *Gibson* v. *AT & T Technologies, Inc.*, 782 F.2d 686 (7th Cir.) (employees sought layoff allowance provided for in agreement), cert. denied, 477 U.S. 905, 106 S. Ct. 3275, 91 L.Ed.2d 565 (1986); *Mason* v. *Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985) (employer's closure of plant and termination of employees was governed by arbitration clause in agreement, especially where employees had two months between announcement and closing to bring grievances), cert. denied, 474 U.S. 1087, 106 S. Ct. 863, 88 L.Ed.2d 902 (1986); *Moore* v. *General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984) (contract provision concerning transfer was source of, and governed, plaintiff's claim that employer required transfer without exercising due care), cert. denied, 471 U.S. 1099, 105 S. Ct. 2320, 85 L.Ed.2d 839 (1985).

The same is also true of the Supreme Court precedents upon which GM relies. See *International Bhd. of Elec. Workers* v. *Hechler*, 481 U.S. 851, 107 S. Ct. 2161, 95 L.Ed.2d 791 (1987) (employee's claim that union violated implied duty of care express-

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for example, contain provisions that are contrary to the representations made, or might reserve the particular issue for further collective bargaining or preclude such inducements on the part of employer representatives. Under such circumstances, interpretation of the collective bargaining agreement, in the sense of construction and application of these provisions, would be required, and federal law probably would govern.[17] But that is not the case here. After careful review of the VTEP, we find no provision that reasonably might be construed to govern the issue of future employment eligibility, nor are there "vague and ambiguous" references to eligibility that might be construed in GM's favor.

Therefore, we hold that where, as here, the employee/plaintiffs' state law claims are founded upon contractual rights or common-law rights independent of those which the collectively-bargained agreement creates, a defense that relies upon the provisions of a collectively-bargained agreement does not invoke federal preemption unless that agreement contains provisions that govern, or reasonably might be construed as governing, the circumstances at hand.[18] Contrary to GM's assertions here, a court's peru-

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[16] *continued*

ly premised upon collective bargaining agreements); *Lueck*, (employee's complaint concerning bad faith handling of disability benefits was substantially dependent upon analysis of contract and the implied duties arising thereunder).

[17] See *supra* note 15.

[18] See *Varnum* v. *Nu-Car Carriers, Inc.*, 804 F.2d 638, 640-41 (11th Cir. 1986), cert. denied, 481 U.S. 1049, 107 S. Ct. 2181, 95 L.Ed.2d 838 (1987). There, the court refused to invoke the preemption doctrine in the context of an employee's complaint that the employer should not have made a representation concerning a salary figure when, at the same time, it was drafting a change in the seniority system/pay scale that would have resulted in a

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sal of the agreement to determine whether such provisions are contained within it does not constitute "interpretation" of that agreement.

Because no governing provision can be found in the VTEP,[19] resolution of the plaintiffs' claims is not inextricably intertwined with the agreement in the sense de-

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[18] *continued*
lesser salary for the employee. The court concluded that the complaint did not go to "a term of employment covered by the collective bargaining agreement." Similarly, in *Anderson* v. *Ford Motor Co.*, 803 F.2d 953, 957 (8th Cir. 1986), cert. denied, 483 U.S. 1011, 107 S. Ct. 3242, 97 L.Ed.2d 747 (1987), the court rejected § 301 preemption of the state-law fraud claims of a group of laid-off employees whom Ford rehired and to whom Ford promised security against being bumped by employees on the preferential hiring list. The court held that *Lueck* did not mandate preemption, as the employees' rights to gain redress for fraud were independent of any contractually-established expectations of the parties.

[19] GM argues in its reply brief that the contract's provisions concerning grievance procedures should govern the plaintiffs' attempt to resolve the dispute and that therefore, § 301 preemption is mandated. In the context of employees' claims that rest upon independent, state-created substantive rights, GM's argument begs the question. In *Lingle*, the Court recognized that although there are strong policies encouraging arbitration, "different considerations apply where the employee's claim is based upon rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." 108 S. Ct. at 1884 (quoting *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737, 101 S. Ct. 1437, 1443, 67 L.Ed.2d 641 (1981)). Here, the state's substantive guarantees apply not just to workers, but to all individuals in their contractual dealings. The difficulty with arbitration, and thus the danger inherent in accepting GM's argument, is that even if an arbitrator were to conclude that some provision of the VTEP governed this dispute and dictated a resolution, "that conclusion might or might not be consistent with a proper interpretation of state law" and its substantive guarantees against fraud in the inducement. *Lingle, id.* at 1885.

scribed by the *Lueck/Hechler/Lingle* line of cases.[20] Under these narrow circumstances, the rationale supporting Section 301 preemption, i.e., avoiding the danger of inconsistent interpretations of collectively-bargained labor agreements, is not at work. Mississippi has a deeply-rooted interest in protecting its citizens from fraudulent conduct, and unlike the federal scheme, provides remedies designed to compensate the victims of fraud for economic harm they may have suffered as a result of their reliance upon false promises. See *Moore*, 739 F.2d at 317 (Fagg, J., dissenting); *Berkline*, 453 So.2d at 702. Accordingly, we conclude that there is no federal preemption here.

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[20] Our holding does not require that a court conclude that the collectively-bargained agreement is *irrelevant* to the dispute; such an agreement might still be used by either party to support the credibility of its claims as to the alleged inducements or representations made. *Cf. Hartle* v. *Packard Elec.*, at 356, holding that ERISA did not preempt an employee's claim, based upon Mississippi common law, that he had an employment contract with Packard Electric that was not subject to the "at-will" doctrine. The employee alleged that his participation in provisions of a General Motors pension plan created the employment contract. The court observed that "[u]nlike other cases in which preemption has been found to exist, Hartle's case does not in any manner implicate the federal regulation of employee benefit plans."

We find that the same is true here with respect to federal regulation of the collective-bargaining process. The VTEP contains provisions that govern unrelated aspects of the separation program (e.g., overpayments, repayment) but might be viewed as not inconsistent with future eligibility, though by no means could they be read as creating or precluding such eligibility. At most, those provisions will serve as evidence to support claims that the alleged inducements were or were not made, or to negate claims that the parties did not raise that issue in bargaining. The agreement thus may remain "intertwined" with the plaintiffs' state law claims; we seek only to mark that point at which it becomes "inextricably intertwined" with those claims.

B. ERISA Preemption.[21]

The resolution of GM's ERISA preemption claim turns on whether the VTEP constitutes an "employee benefit plan" within the meaning of the statute. Relying principally upon the Supreme Court's recent decision in *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 96 L.Ed.2d 1 (1987), we conclude that the VTEP is not such a plan.[22]

In *Fort Halifax*, the Court held that ERISA did not preempt a state statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. The Court based its decision upon several factors: First, ERISA refers to employee benefit plans, not employee benefits. Second, the goal of ERISA's preemption provision is to provide a single set of administrative practices for benefit plans in order to avoid a patchwork scheme of regulation. However,

> [t]his concern only arises . . . with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress preempted state laws relating to *plans*, rather than simply to *benefits*. Only a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation.

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[21] ERISA states that

> [e]xcept as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title and not exempt under Section 1003(b) of this title . . . .

29 U.S.C. § 1144(a).

[22] See also *Hartle*, at 356, holding that ERISA preemption does not occur where state law claims are "only peripherally connected to the concerns addressed by ERISA."

Id. at 11-12, 107 S. Ct. at 2217 (emphasis in original). Because the Maine statute did not require employers to maintain employee benefit *plans*, and because there was no need to create an administrative scheme to make a one-time lump payment, the Court held that the ERISA pre-emption provision did not apply.

The operative facts in *Fort Halifax* are remarkably similar to those in the instant case. GM established a procedure by which employees could elect to receive a one-time lump payment if they ceased working at the plant. The plan was not ongoing, nor was there any need for continuing administration of the payment program (though employees could elect a two-year installment payment option). The facts that GM made the payments pursuant to a Voluntary Termination of Employment "*Plan*" and that the employees received a benefit do not convert the plan into an "employee benefit plan" for purposes of ERISA.

IV. Conclusion.

Holding as we do that the district court had subject matter jurisdiction over the plaintiffs' state-law fraudulent inducement claim and that that claim is not preempted by federal law, the district court's denial of GM's summary judgment motion is in all respects AFFIRMED. This cause, here on interlocutory appeal, is REMANDED to the district court for further proceedings consistent herewith.

REAVLEY, Circuit Judge, specially concurring:

The plaintiffs complain only of GM's representations to persuade them individually to choose the severance payment. GM does not demonstrate any relationship between the VTEP and its decision not to rehire the plaintiffs. I concur in the judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-4665

D. C. Docket No. CA-J-86-0337-L thru 0367 and J-86-381 (1)

MARY R. WELLS, ET AL.,

Plaintiffs-Appellees,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

August 24, 1989

REAVLEY, Circuit Judge, specially concurring.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-4665

MARY R. WELLS, ET AL.,

Plaintiffs-Appellees,

versus

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi

ON SUGGESTION FOR REHEARING EN BANC

(Opinion August 24, 5 Cir., 1989, ____ F.2d ____)

(SEPTEMBER 28, 1989)

Before REAVLEY, POLITZ and SMITH, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

APPENDIX D

MARY R. WELLS, et al., Plaintiffs,

v.

GENERAL MOTORS CORPORATION, Defendant.

Civ. A. Nos. J86-0337(L) to J86-0367(L) and J86-0381(L).

United States District Court
S.D. Mississippi,
Jackson Division.

July 21, 1988.

MEMORANDUM OPINION AND ORDER

TOM S. LEE, District Judge.

This cause is before the court on the motion of defendant General Motors Corporation (GM) to dismiss or, alternatively, for partial summary judgment. Plaintiffs timely responded to the motion and the court has considered the memoranda of authorities together with attachments submitted by the parties. The thirty-two plaintiffs in this cause, all former employees of GM's Packard Electric Division at its Clinton, Mississippi plant, brought this action charging that GM induced them by fraudulent and/or negligent misrepresentations to terminate their employment with GM.[1] Plaintiffs purport to seek remedies based

[1] Each of the thirty-two plaintiffs filed a separate complaint in May of 1986. Their cases were consolidated by orders of this court dated January 16, 1987 and February 6, 1987, respectively.

on alleged violations of state tort law by defendant. GM, though, contends that plaintiffs' claims are in fact collective bargaining disputes concerning employee benefits which plaintiffs have attempted to characterize as state law tort claims to avoid the consequences of federal labor law. Defendant has therefore moved for summary judgment alleging that plaintiffs' state law claims are preempted by Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(5), by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, and by Section 514(a) of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a). In essence, what defendant seeks is a dismissal of this action in favor of the jurisdiction of the National Labor Relations Board (NLRB), but in the event the court determines that dismissal is not warranted, defendant requests a determination that federal labor law, and not state tort law, is applicable.

THE FACTS

Packard Electric is a division of GM which performs the final assembly of wiring harnesses for use in GM automobiles. Packard's divisional headquarters is located in Warren, Ohio. At all times relevant to this action, Packard operated a number of plants in Warren, as well as three plants in Clinton, Mississippi, and one in Brookhaven, Mississippi. Packard employees are represented by the International Union of Electrical, Radio and Machine Workers, AFL-CIO (IUE), and each of the local plants, including the one in Clinton, is represented by a local affiliate of IUE. Packard's Clinton employees, and in particular these plaintiffs, were represented by Local 698.

In the early 1980s, the domestic automobile industry experienced a severe downturn. GM and Packard became

less competitive and as a consequence, between January and March 1982, several hundred employees at the Clinton plant, including plaintiffs, were laid off. Because GM believed that prospects for improvement were bleak, in early 1982, Packard Warren developed a "plan to compete" for implementation in Warren. As part of this plan, the Warren JOBS Committee[2] developed and instituted an "incentive attrition" plan, known as the Voluntary Termination of Employment Plan (VTEP or the Plan), which permitted employees to sell their seniority back to the company and terminate their employment in exchange for monetary payment.

After the VTEP was implemented in Warren, Ohio, the Clinton JOBS Committee began to consider adoption of a VTEP. After numerous meetings between the bargaining committees of Local 698 and of GM management for the purpose of negotiating the terms of a VTEP, the bargaining committees sent a proposed VTEP Memorandum of Understanding incorporating the terms agreed upon to the Packard Clinton JOBS Committee for approval. In early November, the JOBS Committee recommended that the proposed VTEP be offered to Packard Clinton employees and on December 17, 1982, the members of the bargaining team executed a final VTEP Memorandum of Understanding which set the terms of the Plan.

Management met with Packard Clinton employees, including the laid-off employees, in early January 1983 to present the Plan and answer employees' questions. According to plaintiffs, it was represented to the employees that prospects for future work increase at Packard were bleak and that, although by accepting VTEP employ-

[2] The JOBS Committee was a joint union-management committee designed to develop joint solutions to business problems.

ees would be giving up their right to be rehired or recalled, should work increase and new jobs materialize, ex-employees would be eligible for future employment. Because the prospect of being recalled from their lay-off was not very promising, each of the plaintiffs ultimately chose to accept the VTEP option and received payments ranging from $10,000 to $22,000, depending on their years of seniority.

THE CLAIMS

Plaintiffs state that they understood that by accepting the plan for termination, they were relinquishing all of their seniority and losing all rights attendant to that seniority. They claim, however, that GM misrepresented to them, either fraudulently or negligently, that while they were giving up their rights of seniority, they would still be eligible for future employment with the company just as would any other applicant for employment with GM. However, in 1985, when Packard for the first time since plaintiffs' acceptance of VTEP, began hiring new employees, it refused to consider plaintiffs for employment, stating that any former employee who accepted the termination plan offered by GM was not eligible for employment with Packard. Plaintiffs assert that at no time had they understood that their acceptance of the Plan rendered them ineligible for re-employment with GM, and that only when GM began hiring in 1985 did plaintiffs learn of GM's position that they were ineligible for employment. Plaintiffs claim that had they known at the time the termination plan was offered to them, acceptance of the Plan would render them ineligible for future employment at GM's plants, they would not have agreed to termination and would have remained in the employ of defendant.

THE DEFENSES

GM has raised three separate preemption defenses. The first is predicated upon Section 8(a)(5) of the NLRA, 29 U.S.C. § 158, which grants exclusive jurisdiction to the NLRB over any claim of unfair labor practices. The second arises from Section 301 of the LMRA, 29 U.S.C. § 185, which has been held to preempt state law claims where resolution of the claims requires the interpretation of a collective bargaining agreement. The third is based on ERISA, 29 U.S.C. § 1144, which preempts state law as it relates to an employee benefit plan. Plaintiffs deny that any of defendant's preemption defenses are available and claim that they are entitled to pursue their state law remedies.

NLRA

The initial preemption defense raised by GM is that Section 8(a)(5) of the NLRA preempts the plaintiffs' putative state law claims. Unlike defendant's other preemption defense, this defense calls into question the court's subject matter jurisdiction. That is, it raises the issue of whether this court has subject matter jurisdiction or whether the NLRB is vested with exclusive jurisdiction pursuant to the NLRA. Under the NLRA, Congress created the National Labor Relations Board and granted it the power to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160; *see also* 29 U.S.C. §§ 153, 158 and 159. As interpreted, the NLRB enjoys exclusive jurisdiction over any conduct that is "arguably protected" or "arguably prohibited" by the NLRA. *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed.2d (1959). Defendant GM, as the party claiming preemption, has the burden to demonstrate that the conduct complained of by plain-

tiffs is arguably protected or arguably prohibited. *Id.* As the Supreme Court recently explained,

> [i]f the word "arguably" is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, the party asserting preemption must advance an interpretation of the Act that is not plainly contrary to its language and has not been "authoritatively rejected" by the courts or the Board. . . . The party must then put forth enough evidence to enable the court to find that the Board reasonably cannot try the claim based on such an interpretation.

International Longshoremen v. *Davis*, 476 U.S. 380, 106 S. Ct. 1904, 90 L.Ed.2d 389 (1986).

GM contends that VTEP was a mandatory subject of bargaining and as such, GM was required under federal labor law to bargain with the union in good faith before implementing the Plan. Included within its good faith bargaining obligation is the duty to provide adequate information about the subject at issue so that the negotiation process can function properly. See *NLRB* v. *Truitt Manufacturing Co.*, 351 U.S. 149, 76 S. Ct. 753, 100 L.Ed. 1027 (1956); *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279 (6th Cir. 1986). GM submits that during the negotiating process over the VTEP, its negotiating team clearly informed the union's bargaining committee that employees who accepted VTEP benefits would not be considered for rehire if GM's financial picture ever improved. Plaintiffs, however, argue that even if the issue of eligibility for rehire had been discussed during the course of negotiations, the plaintiffs' right to seek future employment with the company was never an issue in the bargaining process and was neither discussed nor included in the VTEP. According to plaintiffs, the conduct at issue in the

case at bar was not the subject of bargaining, was not a term of the VTEP, and was not part of the underlying collective bargaining agreement; the conduct, they claim, is GM's having made fraudulent representations to individual employees, wholly apart from any aspect of the collective bargaining process, in an attempt to prevail upon individual employees to apply for and accept the benefits of VTEP.

GM reasons that if, as it contends, the VTEP was a mandatory subject of bargaining, and if GM bargained with the union in good faith, then the NLRB could legally decide that GM met its NLRA obligations and that its conduct was therefore protected. If, on the other hand, it were determined that defendant did not negotiate over VTEP in good faith, by failing to disclose its true intentions regarding rehire rights or otherwise misleading the union or GM employees, then GM's actions could be held to be in violation of the NLRA and plaintiffs could obtain relief.

GM further points out that once VTEP was negotiated, it was prohibited from by-passing the union and dealing with the employees regarding rehire rights under VTEP. Accordingly, defendant further reasons that if it made the misrepresentations claimed by plaintiffs to have been made, its conduct could be held to be arguably prohibited since good faith bargaining regarding mandatory subjects of bargaining

> means the employer may not as to this subject deal with its employees individually, or unilaterally, and disregard their bargaining agent. And this of course means that after the employer has bargained with the Union about such benefits, and signed a . . . . contract . . . , it may not thereafter deal with its employees individually, or unilaterally, without the approval of their bargaining agent.

In re A.S. Abell Co., 230 N.L.R.B. 17 (1977), *aff'd sub nom, NLRB v. Baltimore News American Division*, 590 F.2d 554, 556 (4th Cir. 1979).

The court accepts, at least for the sake of argument, that VTEP was in fact a mandatory subject of bargaining.[3] Payment to employees for relinquishment of their employment and rights attendant to that employment whose employment is governed by a collective bargaining agreement is in some respects similar to severance pay or pension benefits which have been held to be a mandatory subject of bargaining. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 92 S. Ct. 383, 30 L.Ed.2d 341 (1971); *In re Armour and Co.*, 280 NLRB 96 (1986). In the case at bar, there is no dispute that there was bargaining concerning the terms of the Plan. It does not follow, however, that every conceivable matter which might have been included within VTEP must be characterized as a mandatory subject of bargaining. The fact that the matter at issue here, eligibility for future employment, in retrospect could have been and perhaps should have been included within such a termination plan does not render that topic *a fortiori* a mandatory subject of bargaining. In the court's view, the right to eligibility for future employment is not a subject which necessarily required union/management bargaining. Moreover, the alleged misrepresentations concerning plaintiffs' future eligibility for employment, according to plaintiffs' allegations, were not made to employees on an individual basis in an attempt to bargain with employees individually. Rather, they were made, if at all, to the group of em-

[3] A "mandatory" subject of bargaining is any matter "with respect to wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d).

ployees inquiring concerning VTEP. According to plaintiffs' allegations, the representatives were made simply to induce individual employees to accept the payments made available under the previously negotiated Plan. At that time, the Plan itself had been formally adopted and the alleged misrepresentations were not made during any bargaining process.

In sum, the court is of the opinion that the defendant has failed to sustain its burden to establish the applicability of preemption under Section 8(a)(5) of the NLRA. Accordingly, this court enjoys subject matter jurisdiction over plaintiffs' claims.

Section 301 of the LMRA

Although the court concludes that plaintiffs' claims are not preempted by the NLRA, there remains the more difficult issue of whether plaintiffs' claims are preempted by Section 301 of the LMRA. Section 301 provides a jurisdictional basis in federal courts for

> (s)uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in [the LMRA] or between any such labor organizations.

Section 301 was and is intended to govern disputes between parties to collective bargaining agreements. The mere fact, however, that parties to a particular dispute have a collective bargaining agreement does not mean that their dispute will always fall within the coverage of Section 301. Rather, the dispute must relate to the parties' agreement.

In determining whether plaintiffs' claims are preempted by Section 301, the court's inquiry is guided by the Supreme Court's opinion in *Allis-Chalmers* v. *Lueck*, 471

U.S. 202, 105 S. Ct. 1904, 85 L.Ed.2d 206 (1985), which set forth a framework for analysis of Section 301 preemption issues. The *Allis-Chalmers* Court held that an employe's tort suit alleging bad faith handling of an insurance claim was preempted by Section 301 since the alleged state law tort arose from an alleged violation of the terms of a collective bargaining agreement and resolution of the claim would thus have required interpretation of that agreement. The actual source of the rights and obligations which Lueck sought to enforce was not state law but rather was the collective bargaining agreement, which provided both the basis for the benefits and the right to have payment made in a timely manner.

The court observed that the preemptive effect of Section 301 extends beyond suits alleging contract violations, stating that

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, *whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.*

Id. at 211, 105 S. Ct. at 1911 (emphasis supplied). Recognizing that the preemptive scope of Section 301 does not encompass state law rules which prescribe conduct or establish rights and obligations independent of a labor contract, the Court observed that

> [not] . . . every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301. The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis. [But] *when resolution of a*

> *state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as preempted by federal-contract law.*

Id. at 220, 105 S. Ct. at 1916 (citations omitted) (emphasis supplied). Thus, plaintiffs' claims are preempted if "evaluation of their tort claim[s] is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is preempted." *Id.* at 214, 105 S. Ct. at 1913. Consequently, plaintiffs can avoid preemption only if their claims can be said to be independent of the collective bargaining agreement in the sense that resolution of their claims does not substantially depend upon interpretation or construction of the collective bargaining agreement, for

> if the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute.

Lingle v. *Norge Division of Magic Chef, Inc.*, 486 U.S. 399, ____, 108 S. Ct. 1877, 1881, 100 L.Ed.2d 410 (1988).

The cases in which Section 301 preemption issues have been treated under the analysis provided in *Allis-Chalmers* have revealed little consistency and often appear conflicting. For example, in *Bale* v. *General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986), former employees of General Telephone alleged that the defendant had misrepresented to them at the time of hiring that they would serve as temporary employees for six months after which they would become regular employees. After six months on the job, and as a result of union pressure,

plaintiffs were terminated because under the terms of their collective bargaining agreement, a temporary employee's term could not exceed six months. The court concluded that plaintiffs' state law tort claims of fraud and negligent misrepresentation were preempted under Section 301, reasoning that

> [in] order to prove their fraud and negligent misrepresentation claims, [plaintiffs] would be required to show that the terms of the collective bargaining agreement differed significantly from the individual employment contracts they believed they had made. Resolution of their state tort claims is therefore "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract."

Bale, 795 F.2d at 780 (quoting *Allis-Chalmers*, 471 U.S. at 220, 105 S. Ct. at 1915). A contrary result was reached in *Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), a case in which "bumped" employees of Ford alleged that at the time of hiring, Ford had assured them they would not be "bumped" from their job by persons on a preferential hiring list. Addressing plaintiffs' claim of fraudulent misrepresentation, the court concluded that it was not preempted.

> Fraud is a common law action deeply rooted in local standards of individual and social responsibility. . . . Unlike the tort claim for bad faith handling of an insurance claim considered in *Lueck*, a claim of fraud does not derive from nor depend upon an underlying contract. Under Minnesota law, proof of fraud does not depend on the existence of any contractual relationship, nor do the standards for judging fraudulent misconduct derive from any contractually established expectations of the parties.

Anderson, 803 F.2d 953.

Both plaintiffs and defendant acknowledge that the key issue on this motion is whether resolution of plaintiffs'

claims require an interpretation of the VTEP. The parties, at the time plaintiffs accepted the VTEP, were covered by a master collective bargaining agreement and the VTEP itself was a supplemental agreement which resulted from bargaining between union and management. Plaintiffs assert, though, that their complaints relate not to the agreement itself but to entirely separate conduct by defendant in fraudulently inducing them to accept the Plan. Thus, they claim that resolution of their claim is not "substantially dependent" upon an analysis of the terms of the agreement between the parties, but can be resolved independently of the agreement.

Under the collective bargaining agreement in effect at the time the VTEP was developed by the bargaining committees and later accepted by plaintiffs, laid-off employees enjoyed rehire rights or recall rights for five to seven years, depending on seniority. That is, GM was obligated to rehire its laid-off employees, including plaintiffs, for a period of at least five years if work became available.[4] Under the VTEP, it was provided that

> [a]n employe [sic] who was issued and accepts a VTEP payment shall cease to be an employ [sic] and shall have seniority cancelled at any and all of the Company's plants and locations . . . .

The VTEP further cited that

> [i]f a former employe [sic] is again employed by the Division after he has received a VTEP, no repayment (except with respect to an overpayment) of the VTEP shall be required or allowed; and no seniority previously cancelled shall be reinstated.

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[4] The length of time during which an individual employee was entitled to recall was determined by reference to his seniority status.

According to plaintiffs, they understood that acceptance of VTEP entailed termination of their "rehire" rights thereby making them ineligible for rehire or recall. But they did not consider termination of their rehire rights to render them ineligible for any future employment with GM. Accordingly, plaintiffs assert that the fact that rehire rights may have been discussed and may have been included to some degree in the VTEP does not affect their claims since future eligibility for employment was not a matter bargained over and was not included within the VTEP.

Defendant asserts that although there is some evidence in the record that some form of rehire rights was discussed in bargaining over the VTEP, and while there is some language in the VTEP itself which could be construed as touching upon rehire rights, rehire rights were not negotiated into the VTEP. Nevertheless, defendant reasons that there must be a determination of whether rehire rights in any form were negotiated into the VTEP, and if so, whether the representations allegedly made to employees were consistent with what was in the VTEP, or whether the representations instead amounted to misstatements; this in turn implicates the VTEP itself and requires that the court construe the terms of the Plan to determine whether the representations, if made, were correct or were misstatements.

It is noteworthy that neither side has taken the position that eligibility for future employment was included in the VTEP nor does it appear they could do so. Although the term "rehire rights" has been bandied about in connection with this motion, neither party has been able to seriously contend that that phrase is synonymous with future eligibility for employment. Thus, even if rehire rights were discussed and included in a sense in the VTEP, a matter which both parties deny, that would not resolve this dispute. Hence, resolution of plaintiffs' dispute

is not inextricably intertwined with interpretation of the meaning of the VTEP. Rather, it appears that the issues raised by plaintiffs' claims are

> purely factual questions [which] [pertain] to the conduct of the employee and the conduct and motivation of the employer. Neither of [these] [requires] the court to interpret any term of a collective-bargaining agreement.

Lingle, 486 U.S. at ____, 108 S. Ct. at 1883. Moreover, the right of the employees which was allegedly violated, the right to be free from fraud, derives not from any agreement between the parties but from state law. It is a right which exists independently of and does not depend upon the underlying contract. See *Anderson*, 803 F.2d at 957; see also *Berkline Corp. v. Bank of Mississippi*, 453 So.2d 699, 702 (Miss. 1984) (award of damages based on misrepresentation is notion running deep in our law). The mere fact that this substantive right is advanced in an employment context does not require preemption. "[T]here is nothing novel about recognizing that substantive rights in a labor relations context can exist without interpreting collective-bargaining agreements." *Lingle*, 486 U.S. at ____, 108 S. Ct. at ____. In the case at bar, the court, after careful consideration of the issue, finds that no interpretation of the parties' collective bargaining agreement or VTEP is required. Hence, the court is of the opinion that Section 301 preemption is inapplicable.

ERISA

The defendant's preemption argument based on ERISA is not persuasive. ERISA preemption, while concededly broad, applies only to an employee benefit "plan." 29 U.S.C. § 1144. Under ERISA, an employee benefit plan is "any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or an employee organization" and which provides certain ben-

efits. 29 U.S.C. § 1002(1). In the case at bar, the fact that the termination agreement between plaintiffs and the defendant concerned an employee benefit and was termed a "plan" does not make it a benefit plan for purposes of ERISA. See *Fort Halifax Packing Company, Inc.* v. *Coyne*, 482 U.S. 1, 6, 107 S. Ct. 2221, 2215, 96 L.Ed.2d 1 (1987) (ERISA's preemption provision does refer to state laws relating to "employee benefits" but to those relating to employee benefit "*plans*"). In the *Fort Halifax* case, the Supreme Court concluded that ERISA did not preempt a state law providing a one-time severance benefit to employees in the event of a plant closing.

ERISA preemption encompasses only those plans which are "established or . . . maintained for the purpose of providing its participants or their beneficiaries" those benefits listed under the Act. 29 U.S.C. § 1002(1). In the present case, it is clear that the purpose of GM in instituting VTEP was not to provide its employees with benefits under the Act but was instead to reduce its work force because of the poor conditions of the industry and of GM. And, in the court's view, the termination plan adopted by GM was not such a plan as envisioned by ERISA. Most of the payments to employees were made on a single payment basis and were made solely for the purpose of employee attrition. The court simply does not view the VTEP as coming within the meaning of a "plan" for ERISA purposes. This is consistent with the Supreme Court's decision in *Fort Halifax*.

In conclusion, the court is of the opinion that defendant's motion for summary judgment is not well taken and should be denied. Accordingly, this court has jurisdiction to entertain this matter.

Accordingly, it is ordered that defendant's motion for summary judgment is denied.

ORDERED.

APPENDIX E

MEMORANDUM OF UNDERSTANDING

VOLUNTARY TERMINATION OF EMPLOYMENT PLAN

VTEP

ELIGIBILITY

1. An employe covered by the Collective Bargaining Agreement with Plant Seniority as of the date of the most current period of implementation of this program will be eligible to apply for a termination allowance under this VTEP.

2. Skilled Trades employes may apply for a VTEP Benefit, however, processing of application may be limited, delayed or denied at Management's discretion.

3. Applications for VTEP will be limited to 450 employes and are subject to Management's approval consistent with business conditions. Processing of applications from employes may be limited and/or delayed based on Management's capability to operate the business and train employes. Employes whose applications are delayed will be notified of the delay and will be advised thirty (30) days prior to the anticipated date of processing. VTEP will be granted by seniority with preference given the most senior applying.

APPLICATION PROCEDURE

1. An eligible employe may file an application for a VTEP Benefit under this plan. Such application must be

filed within the time frame, to be announced after all approvals are obtained.

2. VTEP benefits are payable based on the employes years of seniority as of a date to be determined by the Company. VTEP benefits may be payable in a lump sum or in equal monthly installments as shown below:

YEARS OF SENIORITY DEFINED IN 2 APPLICATION PROCEDURE	LUMP SUM	24 MONTHLY INSTALLMENTS	TOTAL AMOUNT INSTALLMENT PAYOUT
Less Than 5	$10,000.00	$458.33	$11,000.00
5 But Less Than 10	$15,000.00	$687.50	$16,500.00
10 But Less Than 15	$20,000.00	$916.67	$22,000.00

3. The amount of an employe's VTEP payment, as defined in 2 above, shall be reduced by any outstanding overpayment to the SUB Plan and any other debts to the Company or trustees of any Company benefit plan or program including overpayments under the GIS Program. The amount of the reduction of the VTEP payment because of SUB Plan overpayments or outstanding debts to the Company or trustees of any Company plan or program, shall be paid by Packard Electric Division to the Company trustee of the SUB Plan Fund, or other Company plan or program, as applicable.

4. An employe who is issued and accepts a VTEP payment shall cease to be an employe and shall have seniority cancelled at any and all of the Company's plants and locations as of the date determined by the Company under the provisions of Paragraph 34(a) of the GM-IUE National Agreement.

5. VTEP payments shall be paid by Packard Electric Division.

6. If it is determined that any VTEP payment should not have been paid or should have been paid in a lesser

amount, written notice thereof shall be mailed to the former employe and the employe shall be obligated to return the amount of the overpayment to the VTEP. Any remaining overpayment balance shall be recoverable from any monies receivable from the Company should the former employe be rehired.

REPAYMENT

1. If a former employe is again employed by the Division after he has received a VTEP, no repayment (except with respect to an overpayment) of the VTEP shall be required or allowed; and no seniority previously cancelled shall be reinstated.

GENERAL

1. Any complaint with respect to the payment or denial of a VTEP payment may be appealed to local Management utilizing procedures similar to the SUB Plan. All appeals will be handled locally.

2. Any term used in the SUB Plan and used in this Plan has the same meaning in this Plan as in the SUB Plan.

3. In the event that an employe receives a VTEP benefit and returns it within fourteen (14) calendar days of the date of the original payment draft shall have seniority reinstated as though it had not been broken.

INTERNATIONAL UNION OF ELECTRICAL,
RADIO AND MACHINE WORKERS,
LOCAL NO. 698, AFL-CIO-CLC

GENERAL MOTORS CORPORATION
PACKARD ELECTRIC DIVISION

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

MARY R. WELLS,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	No. J86-0337(L)
v.	)	
	)	TRIAL BY
GENERAL MOTORS CORPORATION,	)	JURY REQUESTED
	)	
	)	
Defendant.	)	

COMPLAINT

Comes now Mary R. Wells, by and through counsel of record, and files this Complaint against General Motors Corporation and would respectfully show unto the Court the following, to-wit:

1.

Plaintiff is an adult resident citizen of Hinds County, Mississippi.

2.

Defendant, General Motors Corporation, is a Delaware corporation, having its principal place of business in a state other then the State of Mississippi, licensed and authorized to do business and doing business in Hinds County, Mississippi, where it may be served with process

on its agent for service of process, CT Corporation System, whose address is 118 N. Congress St., Jackson, Mississippi.

3.

There is complete diversity of citizenship between the parties and the amount in controversy exceeds Ten Thousand and No/100 Dollars ($10,000.00) exclusive of interest and costs.

4.

Plaintiff was employed on or about September 13, 1986, by the defendant at its Packard Electric Division located in Clinton, Mississippi. As a result of said employment, plaintiff enjoyed certain employee rights, benefits and privileges, including, but not limited to, seniority, all of which were of value to plaintiff.

5.

Prior to January 14, 1983, Plaintiff made application for payment under the provisions of the defendant's Voluntary Termination of Employment Plan (VTEP) whereby she agreed, in consideration of receipt of a VTEP benefit payment, to cease employment with the defendant and to relinquish seniority at any and all Packard Electric and General Motors' plants as of the date terminated by the company.

I. COUNT ONE

6.

Plaintiff realleges and adopts by reference all allegations contained in paragraphs 1 through 5 above.

7.

In December 1982, and January 1983, in a series of group meetings at defendant's facility in Clinton, Mississippi, defendant, through its authorized agents and employees who were acting within the course and scope of their employment, falsely and fraudulently, and with intent to deceive plaintiff, represented to plaintiff and other active and inactive (laid off) employees that there was no prospect in the foreseeable future of recalling the numerous inactive employees at the Clinton plant, and, that in fact, the Clinton plant was experiencing such severe competitive disadvantages that it might be necessary to shut down the plant permanently and terminate most if not all of its active and inactive employes at the Clinton facility; and, that defendant was offering Voluntary Termination of Employment Plan (VTEP) benefits to bargaining unit employees with plant seniority whereby such employees could apply for, on a seniority preference basis, VTEP payments which ranged in amounts from $10,000.00 to $22,000.00; and, that any employee who applied for and accepted VTEP payment would be selling their seniority to the company at any and all of the defendant's plants and locations and would cease to be an employee at the defendant's Clinton, Mississippi, location and that if plaintiff or any other employee who accepted VTEP benefits was later employed by the defendant then the seniority previously cancelled would not be reinstated; and, that if competitive conditions improved and the defendant later began hiring employees and increasing its workforce at the Clinton plant that those employees who had accepted VTEP benefits (VTEP employees) would be given preference over other applications for employment; and, that VTEP employees would be eligible for employment at defendant's other locations on the same basis as other applicants.

8.

Plaintiff, relying upon the truth of defendant's representations, and with every right to rely thereon, and believing that the representations were true, was fraudulently induced to apply for, and was issued, and accepted VTEP benefits on or about February 11, 1983.

9.

Defendant's representations were false and fraudulent in that the defendant knew or should have know that there were no plans or intentions whatsoever to shut down the Clinton plant and that in fact the defendant had plans to restructure its employee workforce and hire additional employees; and, that instead of giving preference to VTEP employees the defendant would, and has, refused to accept applications or employ plaintiff or any other employee who accepted VTEP benefits; and, that defendant would implement, and has implemented, a policy at all of its locations nationwide which prohibits the reemployment of plaintiff or any other employee who accepted VTEP benefits.

10.

As a consequent and proximate result of the aforesaid misrepresentations, plaintiff has been misled and defrauded, and has suffered damages in a sum far exceeding $10,000.00, to be proved with specificity at a trial on the merits of this cause.

II. COUNT TWO

11.

Plaintiff realleges and adopts by reference all allegations contained in paragraphs 1 through 9 above.

12.

Defendant, in December 1982, and January 1983, in a series of group meetings at defendant's facility in Clinton, Mississippi, and in response to employee questions, and in written documents distributed to plaintiff and other active and inactive employees, negligently misrepresented and negligently omitted material and significant facts relevant to the financial and economic situation at the Clinton facility, the defendants' plans to rehire new employees and to restructure and increase its employee workforce, and the effect upon plaintiff and other employees who accepted VTEP benefits with regard to preference for future employment and eligibility for employment at defendant's other locations.

13.

In making the aforesaid negligent representations and omitting other material and significant facts, the defendant's agents and employees, who were acting within the course and scope of their employment, failed to exercise that degree of diligence, good faith, fair dealing and expertise that the plaintiff and other employees were reasonably entitled to inspect [*sic*] from reasonably competent officers, agents and employees of the defendant.

14.

Plaintiff reasonably relied upon the defendant's misrepresentations and omissions in applying for and accepting VTEP benefits.

15.

That as a direct and proximate result of such reasonable reliance, plaintiff has suffered damages in a sum far exceeding $10,000.00, to be proved with specificity at a trial on the merits of this cause.

III. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, the plaintiff respectfully prays for judgment of this Court as follows:

A. Under Count I: A judgment of this Court against the defendant awarding the plaintiff compensatory damages, including but not limited to lost wages and benefits, and all damages proximately resulting from lost wages and benefits, along with pre-judgment and post-judgment interest thereon, the sum of which is uncertain at this time, but which the plaintiff believes to be far in excess of $10,000.00. Plaintiff further requests punitive damages for defendant's fraudulent actions, all costs, fees and expenses of this action, including reasonable attorney's fees.

B. Under Count II: A judgment of this Court awarding to plaintiff compensatory damages, including but not limited to, lost wages and benefits, and all damages proximately resulting from lost wages and benefits, along with pre-judgment and postjudgment interest thereon, the sum of which is uncertain at this time, but which the plaintiff believes to be far in excess of $10,000.00. The plaintiff further requests that the defendant be required to pay punitive damages for its grossly negligent misrepresentation, and to pay all costs in this action, including a reasonable attorney's fee.

C. Such other and further relief to which the plaintiff may be entitled in the premises.

Respectfully submitted,

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APPENDIX G

STATUTORY PROVISIONS INVOLVED

1. Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) provides:

> § 158. Unfair Labor Practices.
> (a) Unfair Labor Practices by Employer.
> It shall be an unfair labor practice for an employer:
> * * *
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

2. Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides:

> § 185. Suits by and Against Labor Organizations.
> (a) Venue, Amount, and Citizenship.
> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

3. Section 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), provides:

> § 1144. Other Laws.
> (a) Supersedure; Effective Date.
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title and not exempt under Section 1003(b) of this title. This section shall take effect on January 1, 1975.

APPENDIX H

The affiliates and non-wholly owned subsidiaries of petitioner General Motors Corporation are:

Aralmex, S.A. de C.V. (Mexico);
Automotriz Gencor S.A. (Ecuador);
Autos y Maquinas del Ecuador S.A. (AYMESA) (Ecuador);
Companis Nacional de Direcciones Automotrices, S.A. de C.V. (Mexico);
Compresores Delfa, C.A. (Venezuela);
Convesco Vehicle Sales GmbH (West Germany);
Daewoo Motor Co., Ltd. (Korea);
DHB-Componentes Automotives S.A. (Brazil);
Fabrica Columbians de Automotores S.A. ("Colomotores") (Columbia);
General Motors de Columbia S.A. (Columbia);
General Motors Egypt, S.A.E. (Egypt);
General Motors Iran Limited (Iran);
General Motors Kenya Limited (Kenya);
GM Allison Japan Limited (Japan);
GM Fanuc Robotics Corp. (USA);
Industries Mecaniques Meghrebires, S.A. (Tunisia);
Industrija Delova Automobils, Kikinda (Yugoslavia);
Isuzu Motors Limited (Japan);
Isuzu Motors Overseas Distribution Corp. (Japan);
Kabelwerke Reinshagen GmbH (West Germany);
Kabelwerke Reinshagen Werk Berlin GmbH (West Germany);
Kabelwerke Reinshagen Werk Neumarkt GmbH (West Germany);
Moto Diesel Mexicana, S.A. de C.V. (Mexico);
Motor Enterprises, Inc. (USA);

New United Motor Manufacturing, Inc. (USA);
Omnibus BB Transportes, S.A. (Ecuador);
Promotora de Partes Electronicos Automotrices (Mexico);
P.T. Mesin Isuzu Indonesia (Indonesia);
Senalizacion y Accessorios del Automobil Yorka, S.A. (Spain);
Suzuki Motor Co., Ltd. (Japan);
Unicables, S.A. (Spain).

Supreme Court, U.S.
FILED
APR 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1067

In The

Supreme Court of the United States

October Term, 1989

GENERAL MOTORS CORPORATION,

Petitioner,

vs.

MARY R. WELLS, ET AL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Respondents are former employees of the Packard Electric Division of General Motors ("GM") located in Clinton, Mississippi. The employees in Clinton are represented by Local 698 of the International Union of Electrical, Radio and Machine Workers AFL-CIO ("IUE"). In 1982, GM and the IUE negotiated and implemented an incentive attrition plan which came to be known as the Voluntary Termination of Employment Plan ("VTEP"). Pursuant to VTEP, employees were offered the opportunity to sell their seniority and concomitant rehire rights in exchange for a set monetary payment. Each of the Respondents applied for and accepted the VTEP payment.

Respondents claim that GM fraudulently induced them, on an individual basis, wholly apart from any aspect of the collective bargaining process, to apply for and accept the VTEP payment. Respondents allege that GM falsely represented to them that acceptance of the VTEP payment would have no effect on their being considered for future employment opportunities, if any, just as other applicants for employment with similar experience and qualifications.

In late 1985 and early 1986, Respondents learned for the first time that GM would not even consider them for re-employment solely because they had accepted the VTEP payment.

Respondents make no complaint about the terms of VTEP nor the terms of any other locally or nationally bargained agreement. They do not contend that GM

QUESTIONS PRESENTED – CONTINUED

breached any contractual duty owed to them under VTEP. They do not complain of any underpayment or denial of payment. They do not complain that VTEP was administered in any improper way. They do not claim that any information was withheld from their bargaining agent that affected any rights they had under VTEP or any other collectively bargained agreement. They do not point to any provision in VTEP as the basis of their claims, either directly or indirectly, nor do they question the interpretation of any word, phrase or provision of VTEP.

The questions presented for review are:

1. Is the conduct in issue, that is, GM's false representations that the Respondents would be considered for future employment opportunities on the same basis as other applicants for employment with similar experience and qualifications, arguably prohibited by the National Labor Relations Act?

2. Even assuming that GM's conduct in making false representations is arguably prohibited by the NLRA, does such conduct fall within a recognized exception to *Garmon* pre-emption?

3. Focusing clearly on the conduct in issue, are Respondents' claims of fraud derived from or substantially dependent upon an analysis of the VTEP so that such claims are pre-empted by Section 301 of the Labor Management Relations Act?

QUESTIONS PRESENTED – CONTINUED

4. Do Respondents' claims of fraud relate to an employee welfare benefit plan established or maintained for the purpose of providing its participants with one or more of the benefits listed in the Employee Retirement Income Security Act, so that ERISA pre-emption would apply?

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STATEMENT OF THE CASE

A. Background.

In the early 1980's the domestic automobile industry experienced a severe downturn. The decreased demand for domestic automobiles caused great economic problems for the Packard Division which produces electrical wiring harnesses for GM automobiles. GM's competition was performing final assembly work on the wiring harnesses at a rate ranging from $6.00 to $9.00 per hour. GM's cost was approximately $19-$21 per hour. To address this competitive disadvantage, GM developed a "Plan to Compete" for the entire Packard Division. One of the strategies in the Plan to Compete was to move final assembly work to Mexico in order to take advantage of lower wage rates. The obstacle to this strategy was that Packard had several hundred employees on layoff, who enjoyed contractual *rehire* rights[1] for up to seven years.

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[1] The distinction must be maintained between "rehire" rights and "eligibility for future employment". Respondents possessed "rehire" rights solely by virtue of the collective bargaining agreement. GM bargained and paid for the relinquishment of Respondents' rehire rights. Respondents understood that they were selling their rehire rights and all other rights they enjoyed by virtue of seniority under the collective bargaining agreement. Respondents are not complaining about any conduct relating to the relinquishment of their rehire rights. Respondents are claiming that they were fraudulently induced to give up their "eligibility for future employment." Eligibility for future employment is not derived from any collective bargaining agreement. As a concept, it is the right any person has to step up to the personnel window, ask for an employment application, and have that application evaluated on its merits. Even though GM has persistently tried to run

(Continued on following page)

Packard's established past practice prohibited the outsourcing of work to Mexico as long as employees with rehire rights were on layoff. Packard's past practice, however, allowed them to move jobs vacated as a result of natural attrition, such as voluntary quits, to Mexican plants which paid lower wage rates. VTEP was developed and instituted to accelerate attrition through voluntary quits. VTEP was simply a vehicle to remove employees from layoff by purchasing their seniority and concomitant contractual rehire rights. Employees who accepted the VTEP payments would be treated as voluntary quits, which, under the contract, is a break in seniority and a forfeiture of rehire rights.

The VTEP was first implemented in Warren, Ohio. In October, 1982, the JOBS Committee[2] in Clinton forwarded a proposed draft of the VTEP to the Bargaining Committee. In December, 1982, GM and Local 698 executed the VTEP.

In January, 1983, several weeks after the VTEP bargaining had concluded, and after the final agreement had been signed and approved by GM and Local 698, meetings were called to explain VTEP to active and laid-off employees. During these meetings, GM contends that its officials explained that Packard had no obligation to

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(Continued from previous page)

together these separate concepts, the Court, in evaluating the pre-emptive effect of the statutes presented, must focus clearly on the conduct actually in issue.

[2] The JOBS Committee was a joint union-management committee designed to develop joint solutions to business problems.

rehire any Packard employee who accepted VTEP benefits. This is not disputed by Respondents, nor do Respondents complain about such statements. What Respondents are complaining about is that Talmadge Portis, the Plant Manager, in response to employee questions in these January meetings, told the employees that acceptance of VTEP benefits would not preclude them from being considered from employment at any other GM plant, or even at the plant in Clinton, if business ever picked up again. Respondents claim that they were told by Mr. Portis that they would be considered for employment in the future just as any other applicant. Some of the employees testified that they were told that their prior experience would give them an advantage over other applicants.

This issue, "eligibility for future employment", had not been a subject of bargaining during the negotiations over other terms and conditions of the VTEP. The statements concerning eligibility for future openings were made in a context wholly unrelated to the bargaining process and did not hinder the Respondents' statutory collective-bargaining rights in any way. The statements did not represent an attempt to unlawfully by-pass the Respondents' exclusive bargaining representation. The statements (which Respondents later learned were false) were made simply to induce individual employees, (in making their uniquely individual decisions) to accept the payments available under the VTEP, as opposed to collective acceptance of the VTEP itself.

GM's representations concerning eligibility for future job openings, if any, was consistent with GM's characterization of employees who accepted VTEP as voluntary

quits. Employees who had quit in the past had never been prevented from seeking future employment, and, in fact, some had been successful in being reemployed. Therefore, GM's representations regarding eligibility for future employment did not constitute a change in GM policy.

In late 1985 and early 1986, Respondents learned for the first time that they would not even be considered for employment at GM because they had accepted VTEP benefits. Thereafter, Respondents filed these lawsuits claiming fraudulent and negligent misrepresentation in violation of state law. In summary, the complaints charge: (1) GM, through its agents, made false representations that VTEP acceptees would be considered for future employment; (2) GM knew these representations were false at the time they were made; (3) Respondents had a right to rely upon these representations in making their individual decisions whether or not to accept VTEP; (4) Respondents actually relied upon these representations in making their decisions; and (5) Respondents suffered injury because of their reliance.

B. GM's Misstatements of Fact.

A misstatement of fact serves as a linchpin of Petitioner's arguments. Petitioner states on Page 3 of its Petition: "It is undisputed that the question of whether employees who accepted VTEP benefits would be eligible for reemployment with GM was discussed during the negotiations."

Petitioner's statement is simply not true.[3] This statement is illustrative of GM's continued efforts to run together the separate concepts of "rehire" rights and "eligibility for future employment".

This case was presented to the district court on GM's Motion for Summary Judgment. GM submitted affidavits and excerpts from deposition testimony to show that relinquishment of rehire rights was a subject of bargaining. While Respondents readily conceded that the *rehire* rights they enjoyed by virtue of their seniority was the subject of negotiation, their rights as non-employee applicants for future jobs openings was never discussed. GM presented no contrary evidence on this issue. The district court stated:

> GM submits that during the negotiating process over the VTEP, its negotiating team clearly informed the union's bargaining committee that employees that accepted VTEP benefits would not be considered for rehire if GM's financial picture ever improved. Plaintiffs, however, argue that even if the issue of eligibility for rehire had been discussed during the course of the negotiations, the Plaintiffs' right to seek future employment with the company was never an issue in the bargaining process and was neither

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[3] In support of its misstatement of fact, GM cites to a portion of the appeal court's decision that was discussing *GM's version of the facts*. This Court must understand that context. In other words, the court of appeals noted that *GM was claiming* that "[Respondents] and their union claim[ed] that the representatives asked about future eligibility and were told that would be 'no problem' ". Pet. 3, n. 1. Such contention is not supported by the record evidence, nor the briefs presented in the courts below.

> discussed nor included in the VTEP. According to Plaintiffs, the conduct at issue in the case at bar was not the subject of bargaining, was not a term of the VTEP, and was not part of the underlying collective bargaining agreement; the conduct, they claim, is GM's having made fraudulent representations to individual employees, wholly apart from any aspect of the collective bargaining process, in an attempt to prevail upon individual employees to apply for and accept the benefits of VTEP.

Pet. App. 30a-31a.

Both courts below reached the factual conclusion on the record evidence that eligibility for future employment was *not* a subject of bargaining. The district court said:

> The fact that the matter at issue here, eligibility for future employment, in retrospect *could have been and perhaps should have been* included within such a termination plan does not render that topic *a fortiori* a mandatory subject of bargaining.

Pet. App. 32a. (Emphasis added). (Also quoted by court of appeals, Pet. App. 6a.)

The petition contains one other gross misstatement of fact:

> "To begin with, it is beyond dispute that Respondents' claims owe their existence to the VTEP Agreement."

Pet. at 19. To the contrary, Respondents' right to be free from fraud is derived solely from state law, not from any agreement between the parties. The false statements which gave rise to Respondents' claims were made in a context wholly unrelated to the VTEP agreement.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

The facts in this case are unique in both genus and specie. Acknowledging that "the dispute is a highly fact-bound one" (Pet. App. 14a) the court of appeals correctly applied the principles set forth in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *International Longshoremen v. Davis*, 476 U.S. 380 (1986), and held that GM had failed to meet the burden of proving in its Motion for Summary Judgment that the conduct in dispute is arguably protected or prohibited by the NLRA. The decision by the court of appeals does not conflict with the decision of any other court of appeals in result or rationale.

The district court and the court of appeals properly applied the test for pre-emption under Section 301 announced by this Court in such cases as *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 201 (1985), and *Lingle v. Norge Div. of Magic Chef, Inc.* ___ U.S. ___, 108 S. Ct. 1877 (1988), and found that the claims presented by Respondents were not pre-empted by federal labor-contract law. The appeal court decisions cited by Petitioner are factually distinct from the case at bar, and from one another, and present no conflict in law for this Court to resolve.

Based upon the facts presented for consideration by the parties in support of and in opposition to the Motion for Summary Judgment, both the district court and the court of appeals, properly applied this Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), and held that VTEP did not constitute an "employee benefit plan" within the meaning of ERISA.

ARGUMENT

I. The Court of Appeals Properly Applied the Rationale of *Garmon* and Its Progeny to the NLRA Pre-Emption Issues, and Its Opinion is Consistent With Those Decisions and the Decisions of Other Courts of Appeal.

Garmon[4] sets forth one of two doctrines[5] announced by this Court for determining whether state causes of action are pre-empted by the NLRA. *Belknap, Inc. v. Hale*, 463 U.S. 491, 498 (1982). Under *Garmon*, state law causes of action are presumptively pre-empted if they challenge conduct that is actually or arguably protected[6] or prohibited by the Act. Even if the conduct in issue is arguably prohibited, however, the state law cause of action may nevertheless be maintained "if the behavior to be regulated is behavior that is of only peripheral concern

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[4] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

[5] The second pre-emption doctrine is set out in *Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) which proscribes state regulation of conduct that was intended by Congress to remain a part of the self help remedies available to parties in labor disputes. *Machinists* pre-emption is not in issue. The Court has also refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that in virtually all instances it is safe to presume that judicial supervision will not disserve the interests promoted by federal labor statutes." *Farmer v. Carpenters*, 430 U.S. 290, 297, *citing, Motor Coach Employees v. Lockridge*, 403 U.S. 274, 297-298 (1971).

[6] Petitioner has abandoned the contention asserted in the courts below that its conduct was arguably protected, in addition to being arguably prohibited.

to the federal law or touches interests deeply rooted[7] in local feeling and responsibility." *Belknap, Inc. v. Hale, supra,* at 498, *citing, Farmer v. Carpenters,* 430 U.S. 290, 296-297 (1977); *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180, 200 (1978); *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 243-244 (1959).

This Court has flatly rejected the notion that *Garmon* must be applied in a "literal, mechanical fashion." *Sears, Roebuck & Co. v. Carpenters, supra,* at 188. *Accord, Farmer v. Carpenters, supra,* at 188.

The Court has also made it clear that the party claiming pre-emption bears the burden of proof on the issue. *International Longshoremen's Ass'n v. Davis,* 476 U.S. 380, 395 (1986).

A. The misrepresentations challenged by Respondents relate to an issue that is not a mandatory subject of bargaining, and even if it were, GM failed to prove that there was a demand for bargaining on the issue.

GM presented two arguments to the circuit court to support its claim that its own conduct was arguably prohibited by the NLRA. First, according to GM, Respondents were challenging GM's good faith in bargaining over the future eligibility issue. According to GM, GM either failed or refused to bargain over the issue; and, the

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[7] The Mississippi Supreme Court has specifically held that accountability for fraudulent inducement is a notion "running deep in our law". *Berkline Corp. v. Bank of Mississippi,* 453 So.2d 699, 702 (Miss. 1984).

issue is a mandatory subject of bargaining which necessitated negotiation before changes[8] could be implemented. Pet. App., 5a.

Factually, both courts below concluded that the issue had not been the subject of bargaining. Both courts concluded, "the fact that the matter at issue here, eligibility for future employment, in retrospect could have been and perhaps should have been" a subject of bargaining during the negotiations over the VTEP terms, did not render that subject *a fortiori* a mandatory subject of bargaining.

The circuit court concluded that an employer's right to evaluate and consider individual applicants for employment lies "at the very core of entrepreneurial control". Pet. App. 6a. As such, the issue would not be a mandatory subject of bargaining, and any failure to bargain over a non-mandatory subject is not arguably prohibited by Section 8(a)(5). *See, N.L.R.B. v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

GM admits in its Petition that "[i]t may indeed be the case that evaluation of completely *new* applicants for employment 'lies at the very core of entrepreneurial control. . . .' " Pet., 14. It must be remembered that the

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[8] Although the court of appeals did not address the issue, it should be noted that the alleged misrepresentations regarding eligibility for future employment did not represent a change or modification of GM's current policy. That is, voluntary quits had always been allowed to reapply for future job openings and that is exactly what they were told would continue to be the policy. Only proposed changes in mandatory subjects require bargaining. If there is no proposed change, there is no failure or refusal to bargain in violation of Section 8(a)(5).

alleged misrepresentations, even though made to current active and laid-off employees, concerned their rights as "new applicants". Thus, GM has tacitly admitted that the conduct in issue concerned a non-mandatory subject of bargaining. The two NLRB decisions cited by the Petitioner do not support a contrary view.

The court of appeals went on to state that even if future employment eligibility were a mandatory subject of bargaining, the duty to bargain over that subject "was not triggered unless and until there was a clear and unequivocal demand for bargaining by the union." Pet. App. 7a. n. 6, *citing, N.L.R.B. v. Katz*, 369 U.S. 736, 743 (1962). This is another rationale supporting the result reached by the circuit court, since GM totally failed to meet its burden of proving that there had been such a demand.

B. The court of appeals correctly applied appropriate principles from *Davis* and held that GM failed to meet its burden of proving that the conduct in issue was arguably prohibited.

The second argument presented to the court of appeals by GM was the odd assertion that its own conduct was arguably prohibited by the NLRA. Applying *Davis*, the court of appeals held that GM had failed to meet its burden on the issue. GM would have this Court believe that the appeal court's application of *Davis* to the facts of this case has effectively "abolished" the arguably prohibited branch of *Garmon*. Pet., 10. A dispassionate reading of the opinion below, however, shows that the alarm sounded by Petitioner is a false one.

In a decision issued not long after the one at bar, the Fifth Circuit had yet another occasion to examine the *Garmon* pre-emption rule for activities that are "arguably prohibited" by the NLRA. *Windfield v. Dover Corporation*, 890 F.2d 764 (5th Cir. 1989). The conduct in issue in *Windfield* was a written personal guarantee of continued employment given to an employee by the company during a union organizing campaign. After the union lost the representation election, the employee was terminated. The union filed unfair labor practice charges with the NLRB alleging violations of Sections 8(a)(1) and 8(a)(3) of the NLRA. After the NLRB refused to issue a complaint, the employee filed suit in Mississippi state court alleging fraud. Although the court did not cite *Davis, supra*, 476 U.S. 380 (1986), it is clear from the opinion that the conduct in issue was "arguably prohibited" by the NLRA. Thus, the court proceeded to apply the analytical framework established by the *Sears/Jones/Belknap*[9] line of cases to determine the appropriateness of pre-emption. Obviously, contrary to Petitioner's contentions, the arguably prohibited branch of *Garmon* pre-emption has not been abolished, but is alive and well.

GM's overstatement of the court of appeals' ruling is evident from the following statement in its Petition:

> In fact, the court of appeals' reformulation of *Garmon* would not be met even in cases where the conduct alleged was *actually* (rather than arguably) prohibited by the Act.

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[9] *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977); *Operating Engineers v. Jones*, 460 U.S. 669 (1983); *Belknap v. Hale*, 463 U.S. 491 (1983).

Pet., 11. *Garmon* makes it clear that conduct which is actually prohibited is pre-empted. No further analysis is required. *Davis* addresses the next step in the analysis by providing a definitional framework for the term "arguably prohibited". In *Davis*, the Court said:

> If the word 'arguably' is to mean anything, it must mean that *the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor.* That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been 'authoritatively rejected' by the courts or the Board. *The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.*

476 U.S. at 395 (citations omitted, emphasis added).

The Court's allocation of the burden of proof in *Davis* prevents either party from utilizing the NLRA as a safe haven for the consequences of state law violations. The decisions of this Court amply demonstrate that Congress never intended to provide such a safe haven. For example, the Court stated in *Linn v. Plant Guard Workers*:

> [Neither] party [has] license to injure the other intentionally by circulating defamatory or insulting material known to be false. . . . In such case the one issuing such material *forfeits his protection* under the Act.

83 U.S. 53, 61 (1965). (citations omitted).

The court of appeals expressed it as follows:

> [A]s the court explains in the passage quoted above [from *Davis*] the party attempting to invoke the Board's jurisdiction must then demonstrate that the Board could reasonably uphold that party's claim. The reason for this requirement is simple and instructive here; the exclusivity of the Board's administrative province, made necessary by the need for uniform treatment in labor disputes, *may not serve as a shelter for those whose claims have no realistic chance of acceptance and no import for national labor policy.*

Pet. App. 9a.

C. Even if the court of appeals had concluded that the conduct in issue was arguably prohibited, *i.e.*, that eligibility for future employment was a mandatory subject of bargaining and that GM met its burden of proving that it arguably failed or refused to bargain in good faith, such conduct would nevertheless fall within a recognized exception to *Garmon* pre-emption.

Even if the conduct in issue is arguably prohibited, it fits into at least two[10] exceptions to *Garmon* pre-emption.

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[10] As noted earlier, even if eligibility for future employment was a mandatory subject of bargaining, only changes in current policy require bargaining, and then, only after an unequivocal demand for bargaining. Neither factor was proved by GM.

Also, since Mississippi law requires that fraud be proved by clear and convincing evidence, "in virtually all instances it is safe to presume that judicial supervision will not disserve

(Continued on following page)

First and foremost of these would be the Court's refusal to pre-empt state-court jurisdiction over conduct that touches "interest so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon, supra,* at 244. *See, Automobile Workers v. Russell,* 356 U.S. 634 (violence); *Linn v. Plant Guard Workers,* 383 U.S. 53 (libel); *Farmer v. Carpenters,* 430 U.S. 290 (intentional infliction of mental distress); *Sears, Roebuck & Co. v. Carpenters,* 436 U.S. 180 (trespass).

In *Sears, supra* at 196-197, the Court identified those factors which have warranted a departure from the general pre-emption guidelines in "local interests" cases under the arguably prohibited branch of the *Garmon* doctrine:

> First, there existed a significant state interest in protecting the citizen from the challenged conduct. Second, . . . the exercise of state jurisdiction over the tort claim entailed little risk of interference with the regulatory jurisdiction of the Labor Board. Although the arguable federal violation and the state tort arose in the same factual setting, the respective controversies presented to the state and federal forums would not have been the same.

(Continued from previous page)

the interest promoted by federal labor statutes." *Farmer v. Carpenters, supra* at 297, *citing, Motor Coach Employees v. Lockridge,* 403 U.S. 274, 297-298 (1971). *See also, Garrison v. Louisiana,* 379 U.S., 74, 75 ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected.")

> . . . For it is only in the [identical controversy] situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.

As the court of appeals noted, "The challenged conduct here was not an attempt on the part of GM to interfere with the collective bargaining process or to diminish the union's representative role; instead, it was a post-bargaining effort to induce individual employees to accept VTEP benefits." Pet. App. 9a. GM's misrepresentations had nothing whatsoever to do with the collective bargaining process, nor were they made in order to obtain ratification or approval of the VTEP agreement. The parties to the collective bargaining process, both the company and the union, had totally fulfilled their roles. The misrepresentations were made to individual employees and involved their *uniquely individual decisions* as to whether they should accept the VTEP benefit. Thus, this case clearly falls within the "non-identical controversy" exception to *Garmon* explained in such cases as *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1977).

Another recognized exception to *Garmon* pre-emption of conduct that is arguably prohibited is for activity which is merely a "peripheral concern" of the Labor Management Relations Act. *Garmon, supra* at 296. The prevention of fraud is only a "peripheral concern" of federal labor law. *See, e.g., Anderson v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); *Gray v. Operating Engineers*, 778 F.2d 1087, 1090 (5th Cir. 1985). On the contrary, however, it is a notion "running

deep" in the law of Mississippi. *Berkline Corp. v. Bank of Mississippi*, 453 So.2d 699, 702 (Miss. 1984).

II. The Court of Appeals Correctly Applied the Principles of Section 301 Pre-Emption and Its Opinion is Consistent With the Decisions of Other Courts of Appeal.

A. The rule of Section 301 pre-emption and its rationale.

The question whether this or any other state action is pre-empted by federal labor-contract law is one of congressional intent. " 'The purpose of Congress is the ultimate touchstone.' " *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1984), *quoting, Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), *quoting, Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). Since Congress did not explicitly state to what extent it intended § 301 of the LMRA to pre-empt state law, local regulation is sustained " 'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.' " *Lueck, supra* at 209, *quoting, Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

This Court has emphasized that " 'pre-emption should not be lightly inferred . . . since the establishment of labor standards falls within the traditional police power of the State.' " *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1885, *quoting, Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 21 (1987).

In this case, the § 301 pre-emption issue is determined by the rule set out in *Lueck, supra*, as refined by *Lingle, supra*. Succinctly stated, the rule is that "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Caterpillar v. Williams*, 482 U.S. 386, 394 (1986) *quoting, Electrical Workers v. Hechler*, 481 U.S. 851, 859 n. 3 (1987); *and citing, Allis-Chalmers v. Lueck*, 470 U.S. 202, 220 (1985).

The rationale for the rule was first set forth in *Teamsters v. Lucas Flour Co.*, 369 U.S. 103 (1962) where the court explained:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

Id., at 103.

In delineating the scope of § 301 pre-emption the Court has cautioned:

> [N]ot every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law. . . . In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Lueck, supra at 211-212, *quoted in, Caterpillar, Inc. v. Williams*, 482 U.S. 386, 395 (1987) *and in, Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S.Ct. 1877, 1883-1884 n. 10, 1885 n. 12 (1988).

The bottom line is that this Court has determined that Congress intended to pre-empt the application of state law *"only if such application requires the interpretation of a collective-bargaining agreement." Lingle, supra* at 1885, (Emphasis added). Such rule "is consistent both with the policy of fostering uniform, certain adjudication of disputes over the meaning of collective-bargaining agreements and with cases that have permitted separate fonts of substantive rights to remain unpre-empted by other federal labor-law statutes." *Id.*, at 1884.

B. The rule of Section 301 pre-emption was properly applied.

Both courts below recognized that Respondents' state-law fraud claims do not fall within the rule of § 301 pre-emption. Respondents' state-law claims are completely "independent" of the VTEP "in the sense of 'independent' that matters for § 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement." *Lingle, supra,* at 1882.

Respondents do not dispute any of the terms of VTEP. Respondents do not look to VTEP as the source of their claims or to support their claims. No provision in the VTEP provides a defense to Respondents' claims. Respondents do not urge an interpretation one way or

another regarding any provision of VTEP. Not one element in their state-law claim for fraud "requires a court to interpret any term of a collective-bargaining agreement." *Id.* Stated another way, if Respondents had brought a lawsuit under § 301, what provision of VTEP could they point to as having been breached? What term could they look to as supporting or defeating their claim? What provision could they ask the court to enforce? Obviously, the answer is that there is no such provision. Consequently, the court of appeals was correct in its conclusion that pre-emption under § 301 was not appropriate.

The court of appeals noted that GM's arguments for § 301 pre-emption were flawed because, "the argument rests upon an unsound premise: namely, that the Plaintiffs' claim is that GM's representatives fraudulently misrepresented what was in the contract." Pet. App. 14a. As in *Caterpillar*, GM has attempted to create the prerequisites for pre-emption by "ignoring the set of facts . . . presented by Respondents, along with their legal characterization of those facts. . . ." *Caterpillar, Inc. v. Williams*, *supra* at 397. Also as in *Caterpillar*, GM has "[failed] to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, so long as the contract relied upon is *not* a collective-bargaining agreement." *Id.*, at 396. *Accord*, *Lingle*, *supra* at 1883 ("[A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 purposes.")

The court of appeals was correct in making the following conclusion concerning the § 301 pre-emption issue:

> [R]esolution of the Plaintiff's claims is not inextricably intertwined with the agreement in the sense described by the *Lueck/Hechler/Lingle* line of cases. *Under these narrow circumstances,* the rationale supporting Section 301 pre-emption, *i.e.,* avoiding the danger of inconsistent interpretations of collectively-bargained labor agreements, is not at work.

Pet. App. 18a. (Emphasis added).

C. The courts of appeal are applying the rules of Section 301 pre-emption consistently to the specific facts and claims presented by each case.

Petitioner would have this Court believe that the courts of appeal are "hopelessly divided" on whether § 301 pre-empts state law fraud and misrepresentation claims. Respondents submit that this is not the case at all.

In support of its conclusion that there is a conflict in the circuits, Petitioner first seeks to establish the premise that the cases can be lumped into one broad category labeled "extra-contractual/extraneous promises". Pet., 20. Building on this premise, Petitioner next states that the Third, Eighth and Fifth Circuits hold that "such claims" are not pre-empted. Pet., 21. On the other hand, Petitioner asserts that "such claims" are pre-empted by the Ninth and Eleventh Circuits. Pet., 22. Finally, Petitioner seeks to heap conflict upon conflict by stating that in the Eleventh Circuit the resolution of "such claims" depends upon whether the extra-contractual promise was

made when the employee was a member of the bargaining unit. Pet., 22.

Petitioner's tautological conclusion that a conflict exists in the circuits is drawn from a faulty premise. Contrary to Petitioner's assertion, the Section 301 pre-emption cases cited by the Petitioner simply cannot be lumped into one broad category labeled "extraneous promises cases", which on that basis alone, either are or are not pre-empted by the courts of appeal.

Significantly, eight of the ten cases cited by Petitioner were decided before *Lingle*.[11] Respondents submit that *Lingle* virtually eliminated any confusion that may have existed concerning the rule of § 301 pre-emption.

Even prior to *Lingle*, however, it is abundantly clear that the courts below have been faithfully asking the correct question in each of the § 301 pre-emption cases; *i.e.*, does the state law claim depend upon an interpretation of the collective-bargaining agreement for its resolution? Granted, some of the cases have reached seemingly different results on fact patterns that were similar in some respects. Upon inspection, however, it is clear that in each case the decision rested upon the interplay between the specific elements of the cause of action alleged under that state's law, and the specific facts presented, particularly, the terms of the collective bargaining agreement. *E.g.*, *DeLapp v. Continental Can Co., Inc.*, 868 F.2d 1073, 1075 (9th Cir. 1989) ("We conclude that *DeLapp*'s state claim is

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[11] One of those, *Chmiel v. Beverly Wilshire Hotel Co.*, 873 F.2d 1283 (9th Cir. 1989), was actually decided after *Lingle*, but was argued three months before *Lingle* was decided.

pre-empted by federal labor law because the provision in the collective bargaining agreement governing the early pension benefit program must be interpreted to resolve the claim."); *Bale v. General Telephone Co.*, 795 F.2d 775 (9th Cir. 1986) (Contract definition of "temporary employee" governed dispute).

In *Berda v. CBS, Inc.* 881 F.2d 20 (3rd Cir. 1989), *cert. denied*, ___ U.S. ___ (1990), the court discussed the ostensible differences in some of the cases cited by Petitioner, and came to the following conclusion:

> All these courts have agreed that the claims are pre-empted to the extent that they 'substantially depend' on the interpretation of a collective bargaining agreement. However, the courts have differed on the more particular question whether in fact there would be substantial dependence in the case before them.

Id., at 25.

Obviously, not every factual scenario presents an easy answer when the Section 301 pre-emption test is applied. The test, however, is clear.[12] The circuits are not

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[12] In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289-290 (1971), this Court said:

> [W]e [cannot] proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does, or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.

in conflict, and the petition for certiorari should be denied.

III. The Court of Appeals Properly Applied the Principles Governing Pre-Emption by ERISA Set Forth in *Fort Halifax*.

"[A]s in any pre-emption analysis, 'the purpose of Congress is the ultimate touchstone.' " *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). This court has examined Congress' intentions regarding ERISA pre-emption and has found that "ERISA's central focus [is] administrative integrity." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 18 (1986). As the Court explained in *Fort Halifax*:

> Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation. It is for this reason that Congress pre-empted state laws relating to *plans*, rather than simply to *benefits*.

Fort Halifax, supra, at 11.

In the case at bar, the court of appeals said:

> The operative facts in *Fort Halifax* are remarkably similar to those in the instant case. GM established a procedure by which employees could elect to receive a one-time lump payment if they ceased working at the plant. The plan was not ongoing, nor was there any need for

> continuing administration of the payment program (though employees could elect a two-year installment payment option). The fact that GM made the payments pursuant to a Voluntary Termination of Employment *"Plan"* and that the employees received a benefit do not convert the plan into an "employee benefit plan" for purposes of ERISA.

Pet. App., 20a.

Petitioner cites *Pane v. RCA Corp.*, 868 F.2d 631 (3rd Cir. 1989) as the only other court of appeals decision decided after *Fort Halifax* dealing with the issue of an "employee benefit plan" under ERISA. There, RCA, which was engaged in merger negotiations with General Electric Company, adopted an employee severance plan under which its Vice Presidents and General Managers were to receive lump sum termination benefits, provided that certain "triggering events" occurred. *Pane v. RCA Corp.*, 667 F.Supp. 168, 170-171 (D.N.J. 1987). The plaintiff, who was Vice President and General Manager of one of RCA's divisions, claimed that RCA withheld from him the benefits of the severance plan, and that, when he attempted to exercise his rights under the plan, the defendant retaliated against him. *Id.* In Count I of his complaint, the plaintiff asserted that the severance plan was an employee benefit plan within the meaning of ERISA and that defendant's conduct violated various provisions of ERISA. In Counts II, III and IV the plaintiff asserted breach of contract and tort claims under state law. The defendant moved to dismiss Counts II, III and IV on the grounds that they were pre-empted by ERISA. *Id.* The district court held that the severance plan created "an ongoing administrative system constituting an ERISA

plan," primarily because the specific provisions of the severance program required "a separate determination of each individual's eligibility for benefits." *Id.*, at 171.

The court of appeals affirmed the ruling of ERISA pre-emption and simply stated: "[The severance plan] came into being on December 8, 1985, when RCA's Board of Directors authorized the concept and RCA's management identified a potential class of participants. *It required an administrative scheme.* Thus the court correctly held that the plan for awarding severance agreements is an ERISA employee benefit plan." *Pane v. RCA Corp.*, 868 F.2d 631, 635 (3rd Cir. 1989) *cert. denied*, ___ U.S. ___ (1990) (emphasis added).

The case at bar is factually distinct from *Pane*. Here, both the court of appeals and the district court[13] concluded that there was no ongoing administrative system

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[13] The district court also concluded that ERISA pre-emption was inappropriate because the VTEP was not " established or . . . maintained for the purpose of providing its participants or their beneficiaries' those benefits listed under the Act. 29 USC § 1002(1)." Pet. App. 40a. The district court found that the sole purpose of VTEP was employee attrition, rather than providing its employees with benefits under the Act. Pet. App. 40a.

While not addressing the issue directly, the court of appeals also indicated that ERISA pre-emption would be inappropriate because Respondents' state-law claims are only peripherally connected to the concerns addressed by ERISA." Pet. App. 19a n. 22. *See also, Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100, n. 21 (1983) ("Some state actions may affect employee benefits plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan.").

which would transform the one-time benefit program into an ERISA benefit "plan." As the court of appeals said:

> The plan was not ongoing, nor was there any need for continuing administration of the payment program. . . .

Pet. App. 20a.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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GENERAL MOTORS CORPORATION,

Petitioner,

vs.

MARY R. WELLS, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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I. THE *GARMON* PRE-EMPTION ISSUE

We demonstrated in the petition (at 8-15) that (a) the Fifth Circuit effectively abolished the "arguably prohibited" branch of the *Garmon* pre-emption doctrine and (b) improperly decided that the future employment eligibility of existing employees is not a mandatory subject of bargaining. Not surprisingly, respondents make no effort to defend these indefensible rulings. Rather, as to the former, they attempt to deny the plain holding of the court of appeals, and as to the latter, they simply misconstrue the petition as "tacitly admitt[ing] that the conduct in issue concerned a non-mandatory subject of bargaining." Br. in Opp. 11.

A. Contrary to respondents' irrelevant and repetitive references to burdens of proof (Br. in Opp. 11-14), the court of appeals was willing to assume that GM's conduct *was* arguably prohibited by the NLRA (Pet. App. 9a). The court below nonetheless held that, after this Court's decision in *Davis*, that was no longer a basis for *Garmon* pre-emption (*ibid.*; emphasis in original):

> By its own cast, GM's argument concerning its "circumvention" of union representatives goes only to show that its conduct was arguably *prohibited* by the Board; hence, its claim could not reasonably be *upheld* by the Board.

The Fifth Circuit's holding could not be clearer. It did not hold, as respondents would have it, that GM merely "failed to meet its burden" of proving that its conduct was arguably prohibited by the NLRA. Instead, it held that an argument that a party's own conduct was arguably prohibited is not a claim that could be "upheld" by the Board and is therefore not a ground for pre-emption.

The court of appeals' decision is based on a dangerous and erroneous construction of *Davis* and directly conflicts with decisions of several other circuits that have continued properly to apply the "arguably prohibited" branch of

Garmon after *Davis*. See, *e.g.*, *Overby* v. *Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989); *Parker* v. *Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), cert. denied, 109 S. Ct. 2066 (1989); *Kolentus* v. *Avco Corp.*, 798 F.2d 949 (7th Cir. 1986), cert. denied, 479 U.S. 1032 (1987).[1]

Respondents also assert (Br. in Opp. 14-17) that even if the court of appeals had held that claims relating to conduct arguably prohibited by the NLRA would ordinarily be pre-empted, their claims would fall within two exceptions to *Garmon* pre-emption. But neither of the courts below discussed those exceptions, much less found them applicable to the facts of this case. In any event, as we pointed out in the petition, if respondents' fraud and misrepresentation allegations were true, they would amount to claims that the company bypassed the union and bargained directly with the employees and that it persuaded the union to accept the VTEP plan by misrepresenting its consequences. Respondents' state law claims thus seek to regulate the identical conduct that Congress reserved for the Board. And such conduct can hardly be considered of "peripheral concern" to the federal statute. *Parker* v. *Connors Steel Co.*, 855 F.2d at 1518; *Serrano* v. *Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1287 (6th Cir. 1986).[2]

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[1] The Fifth Circuit's decision in *Windfield* v. *Groen Div., Dover Corp.*, 890 F.2d 764 (1989), does not diminish the import of this case. *Windfield* did not even cite *Davis* or the decision below. Moreover, *Windfield* relied on entirely separate grounds for reaching the questionable conclusion that state law claims relating to alleged misrepresentations made in the heat of a union election campaign were not pre-empted by the NLRA.

[2] In light of respondents' unfounded contention (Br. in Opp. 16-17) that the issues in this case are merely of "peripheral concern" to the NLRA and thus do not unduly interfere with the Board's prerogatives, the Court may wish to request the views of the Solicitor General on this issue, as well as on the issue of whether the VTEP plan is an employee benefit plan within the meaning of ERISA. See 29 C.F.R. § 2510.3-1(a)(3) ("the effect of section 3(1)(B) of [ERISA] is to include within the definition of 'welfare plan' those plans which provide * * * severance benefits").

B. Respondents argue that the court of appeals correctly held that their claims were not pre-empted because the future employment eligibility of employees about to be voluntarily terminated is not a mandatory subject of bargaining. Br. in Opp. 10-11.[3] As we pointed out in the petition (at 12-15), however, that far-reaching conclusion is neither correct nor a proper one for the court of appeals to have reached without guidance from the NLRB. Although it may be true that employers do not have to bargain over the eligibility of entirely *new* applicants for employment—people who never worked for the company—it is at least widely assumed that employers must bargain over the reemployment rights of employees being laid off or terminated. See, *e.g.*, *Hagy, Harrington & Marsh*, 74 NLRB 1455, 1478 (1947). But now the law in the Fifth Circuit is that employers no longer have to bargain over the reemployment rights of employees being terminated. The court of appeals' holding is anomalous and presents a serious threat to settled employer-union relations.[4]

Respondents seek to prevent review of this important pre-emption issue by arguing (Br. in Opp. 11) that no bargaining obligation could have been triggered in the absence of a formal bargaining demand. But even if it were

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[3] Respondents attempt to construe the lower courts' decision that future eligibility is not a mandatory subject of bargaining as holding only that future eligibility was not a subject of discussion at the bargaining table when the VTEP was discussed. Br. in Opp. 6, 10. But those are clearly quite separate issues.

[4] Respondents repeatedly try to equate themselves with truly new applicants who have never worked for GM. Certainly GM and the union could agree to a VTEP contract under which voluntarily terminated employees would be treated the same as new applicants. But prior to the decision below, it was thought that an employer would be required to bargain with the union over the impact of the terminations on reemployment rights. See *First Nat'l Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 677 n.15 (1981). The import of the court of appeals' decision is that GM and other employers no longer have an obligation even to bargain over reemployment rights once they have decided to terminate an employee.

true that there was no bargaining demand,[5] there would be two problems with respondents' argument. First, as the court of appeals acknowledged (Pet. App. 9a n.8), if future eligibility were a mandatory subject of bargaining, GM's announcement that it would not consider VTEP recipients for reemployment was arguably a unilateral change in employment terms and thus arguably a *per se* violation of Section 8(a)(5). *NLRB* v. *Katz*, 369 U.S. 736 (1962). As respondents state in their Brief in Opposition (at 10 n.8), they claimed below that employees who left GM voluntarily "had always been allowed to reapply for future job openings." GM responded that ineligibility for future employment was part of the negotiated VTEP deal and therefore refused to allow respondents to reapply. Clearly, if respondents' allegations were true, GM unilaterally changed the reemployment rule. Even if there had been no demand for bargaining, such a unilateral change would be arguably prohibited by Section 8(a)(5).

In addition, respondents assert that GM induced them to accept the VTEP by offering them something it did

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[5] As we noted in the petition (at 15 n.3) the court of appeals acknowledged that the union did raise the issue of employment eligibility at the bargaining table. Respondents suggest (Br. in Opp. 3-6) that we have misstated the court of appeals' account of the facts, but the court's statement speaks for itself (Pet. App. 3a):

> GM's version of the facts contradicts that of the plaintiffs and their union in every important respect. GM contends that the parties raised the issue of "rehire rights" in bargaining over the VTEP and that GM officials specifically told union representatives that employees opting for VTEP would not be eligible for rehire. Plaintiffs and their union claim that the representatives asked about future eligibility and were told that would be "no problem."

Whichever version one accepts, the issue did come up. Even if, in light of that alleged representation that reemployment would be "no problem," there was no formal demand for bargaining on the issue, GM's alleged conduct would constitute a material misrepresentation at the bargaining table in violation of Section 8(a)(5).

not offer through the union at the bargaining table. That certainly amounts to a claim that GM bargained directly with employees in violation of Section 8(a)(5), without regard to whether the union ever demanded to bargain over the issue. *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678, 684 (1944). The court of appeals did not hold that this part of GM's argument was in any way foreclosed; instead, it erroneously held that after *Davis*, GM could no longer base its defense of pre-emption on a claim that its own conduct was arguably prohibited by the NLRA.

II. THE SECTION 301 PRE-EMPTION ISSUE

As we explained in the petition (at 15-24), respondents' state law claims are "inextricably intertwined with consideration of the terms of the [VTEP] labor contract." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 213 (1985).[6] The dispute in this case concerns the consequences flowing from the VTEP Agreement, and the express and implied rights of the parties under that negotiated collective bargaining agreement. The court below made the same error that the state court made in *Lueck*: it "evidently assumed that the only obligations the parties assumed by contract are those expressly recited in the agreement." 471 U.S. at 214. That assumption "is not one that state law may make." *Id.* at 215. Respondents completely fail to address this critical point.[7]

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[6] Respondents (Br. in Opp. 6) accuse GM of making a "gross misstatement of fact" by stating that "it is beyond dispute that respondents' claims owe their existence to the VTEP Agreement." Pet. 19. GM stands by that statement; clearly had there been no VTEP there would have been no representations about its consequences and thus no possible claims of misrepresentation.

[7] Respondents ask (Br. in Opp. 20) what provisions of the VTEP might be construed to relate to their claims. Certainly paragraph 6 of the Application Procedure (Pet. App. 42a-43a) and paragraph 1 of the Repayment provision (*id.* at 43a) might be of significance.

(Footnote continued on following page)

Moreover, respondents' claim that GM misrepresented the consequences of accepting VTEP benefits unquestionably requires interpretation of the VTEP Agreement to see if the alleged representations were untrue. Even as they argue that their claims do not require any interpretation of the VTEP Agreement, respondents go to great lengths (Br. in Opp. 1 n.1) to convince the Court that their interpretation of the term "rehire rights" is correct and critical to an understanding of this case. But the very fact that respondents have to make that argument about the meaning of the VTEP Agreement is the best evidence that "any attempt to assess liability [on respondents' state-law claims] * * * inevitably will involve contract interpretation." *Lueck*, 471 U.S. at 218.

Notwithstanding respondents' assertion to the contrary, the courts of appeals are in direct conflict over whether extracontractual promises made to bargaining unit employees may be enforced under state law. The Ninth and Eleventh Circuits have held that such claims are pre-empted by Section 301. *DeLapp* v. *Continental Can Co.*, 868 F.2d 1073, 1074-1076 (9th Cir. 1989); *Darden* v. *United States Steel Corp.*, 830 F.2d 1116, 1119-1120 (11th Cir. 1987). The Fifth Circuit has held to the contrary. Plainly, the differences between these courts are the results of disagreements over law (*i.e.*, the significance of whether the plaintiffs were employees and members of the bargaining unit when the allegedly false statements were made) rather than fact.[8]

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[7] *continued*
But even if these express provisions were not included in the VTEP Agreement, the court of appeals nonetheless improperly "assumed that the contract contained no implied terms bearing on the issue of reemployment rights." *Lueck*, 471 U.S. at 214.

[8] As we pointed out in the petition (at 21-23), the Third, Eighth and Eleventh Circuits have held that claims relating to *pre-employment* promises are not pre-empted by Section 301, but the Ninth

(Footnote continued on following page)

Even though respondents grudgingly concede (Br. in Opp. 22) that "some of the cases have reached seemingly different results on fact patterns that were similar in some respects," they suggest (*ibid.*) that the conflict among the courts of appeals has been resolved by *Lingle* v. *Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988). But that decision did not address pre-emption of claims arising from extracontractual promises, and in any event the conflict between the Fifth and the Ninth Circuits post-dates *Lingle*. Review by this Court is needed to resolve that conflict.

III. THE ERISA PRE-EMPTION ISSUE

Perhaps the most troubling aspect of the court of appeals' decision is its conclusion that the VTEP severance benefit plan was not an employee benefit plan under ERISA. As we noted in the petition (at 26), that conclusion not only means that state law claims relating to severance plans like the VTEP are not pre-empted. It also means that the entire regulatory framework of ERISA is inapplicable to such plans. Such a far-reaching decision, in clear conflict with those of other courts of appeals, requires this Court's review.

Respondents give short shrift to the important ERISA pre-emption issue presented by this case and rather lamely attempt to refute the fact that the Third and the Fifth Circuits are in clear conflict. The Third Circuit has held

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[6] *continued*
Circuit has reached the opposite conclusion. This Court recently denied a petition for certiorari seeking review of the Third Circuit's decision on that issue. *CBS, Inc.* v. *Berda*, No. 89-589 (cert. denied Jan. 22, 1990). The pre-emption issue relating to pre-employment promises may be regarded as having been settled by this Court's decision in *Caterpillar Inc.* v. *Williams*, 482 U.S. 386 (1987). But there has been no resolution of the post-*Caterpillar* conflict among the Fifth, Ninth and Eleventh Circuits on the very different issue relating to extracontractual promises made to employees who were members of the bargaining unit at the time of the alleged promises.

that a severance program involving a limited number of employees and a single anticipated set of job terminations was an employee benefit plan under ERISA. *Pane* v. *RCA Corp.*, 868 F.2d 631 (1989). The Fifth Circuit in this case held that a similar severance plan was not covered by ERISA. The conflict could hardly be sharper.

Respondents attempt to distinguish *Pane* on the ground that the Third Circuit found that the RCA plan required an administrative scheme, while the Fifth Circuit found that GM's VTEP plan did not require such a scheme. Br. in Opp. 26. But that merely restates the fact that the two courts reached opposite conclusions of law: faced with similar facts (company severance programs adopted to deal with a single set of anticipated job terminations), the Third Circuit held that the plan involved an "administrative scheme" and was subject to ERISA, and the Fifth Circuit held that the plan did not involve an "administrative scheme" and was not subject to ERISA. Respondents offer no reason to believe that the Third Circuit would have found ERISA inapplicable in this case.

Other courts that have considered the issue have deemed similar severance programs to be governed by ERISA. For example, in *Berlin* v. *Michigan Bell Telephone Co.*, 858 F.2d 1154 (6th Cir. 1988), the employer adopted a special one-time severance program in order to reduce its number of managers. The program was available only to a limited number of employees who elected to retire during a set two-month period, and provided special severance benefits to be paid over a one-year period.[9] The Sixth Circuit held that ERISA's fiduciary obligation applied to the plan. *Id.* at 1162. Similarly, in *Young* v. *Standard Oil (Indiana)*, 849 F.2d 1039 (7th Cir.), cert. denied, 109 S. Ct. 529 (1988), the employer had a standing severance allowance

[9] In this case GM employees could have their VTEP benefits paid over two years. Pet. App. 42a.

policy that "management could elect to 'apply to a particular employee-reduction situation.' " 849 F.2d at 1040-1041.[10] The Seventh Circuit held that the severance program was an ERISA benefit plan, even as applied to a particular set of job terminations caused by the sale of one plant. *Id.* at 1045.

By contrast, the Fifth Circuit relied on *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987), in holding that the VTEP plan was not governed by ERISA. But *Berlin*, *Young* and *Pane* all reached the opposite conclusion after the decision in *Coyne*. In fact, the Third Circuit in *Pane* expressly relied on *Coyne*. 868 F.2d at 635. See also *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503-1504 (9th Cir. 1985); *Blau* v. *Del Monte Corp.*, 748 F.2d 1348, 1352 (9th Cir.), cert. denied, 474 U.S. 865 (1985); *Sly* v. *P.R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983) (pre-*Coyne* decisions holding that similar severance benefit programs were subject to ERISA).

The district courts are in accord. Indeed, only a few weeks ago, one court held that a GM VTEP plan adopted to deal with a single plant closing was governed by ERISA. *Drennen* v. *General Motors Corp.*, No. C-1-88-515 (S.D. Ohio 1990). See also *Balock* v. *Mars Electronics Int'l, Inc.*, No. 89-1290 (E.D. Pa. 1990) (voluntary severance benefit plan offered as part of a corporate reorganization is an ERISA benefit plan).[11]

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[10] This was much like GM's VTEP, which was negotiated between the union and GM elsewhere and then applied to the Clinton plant by subsequent decision. Pet. App. 26a-27a.

[11] Respondents repeat (Br. in Opp. 26 n.13) the district court's conclusion that the VTEP plan was not covered by ERISA because "the purpose of GM in instituting VTEP was not to provide its employees with benefits under the Act but was instead to reduce its work force * * *." Pet. App. 40a. Obviously, employers provide employee benefits in all cases to serve their business purposes. If employee pension or welfare benefit plans are not covered by ERISA whenever the employer adopts or agrees to them to serve its own economic interests, ERISA would be an empty statute indeed.

As this Court has recently noted, "plans to pay employees severance benefits, which are payable * * * upon termination of employment, are employee welfare benefit plans within the meaning of [ERISA]." *Massachusetts* v. *Morash*, 109 S. Ct. 1668, 1673 (1989). The court of appeals' contrary conclusion requires the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 89-1067

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GENERAL MOTORS CORPORATION,
Petitioner,
v.
MARY R. WELLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 37.1 and .2 of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") respectfully moves this Court for leave to file the accompanying brief amicus curiae in support of Petitioner in this case. Respondents Mary R. Wells, *et al.*, have refused consent. In support of this motion, EEAC by the following shows that this brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties.

1. EEAC is a nationwide association of employers and trade associations organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community. The Council's governing body is a Board of Directors composed of experts in the field of equal employment opportunity. Their combined experience gives the Council an unmatched depth of knowledge of the practical as well as the legal aspects of equal employment policies and requirements. The members of EEAC are firmly committed to the principles of nondiscrimination and equal employment opportunity.

2. All of EEAC's members, and the constituents of its trade association members, are employers subject to various employment and labor laws, including the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*, the Labor Management Relations Act (LMRA), 29 U.S.C. § 141 *et seq.*, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.*, all of which pre-empt suits under state law in certain circumstances. Many EEAC members are parties to collective bargaining agreements and have entered into, or may enter into in the future, collectively bargained severance pay agreements similar to that involved in the case at bar. Moreover, EEAC members conduct business in virtually all states, and are subject to state tort suits which are potentially pre-empted by federal law.

3. Thus, EEAC members have a substantial interest in the issues presented for review in this case—whether and when state tort claims of fraudulent misrepresentation arising out of a collectively bargained severance pay agreement are preempted by the NLRA, the LMRA, or ERISA.

The Fifth Circuit held that in order to show preemption under the NLRA, a party must show not only that its alleged conduct is "arguably prohibited" by § 8 of the NLRA, but also that it is likely to succeed on the

merits of the case before the National Labor Relations Board, two mutually inconsistent propositions. This conclusion conflicts with this Court's decisions in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and *International Longshoremen's Association v. Davis*, 476 U.S. 380 (1986), which require at most that the party seeking pre-emption put forth enough evidence to enable a court to conclude that the activity arguably is subject to the Act. Likewise, the Fifth Circuit ruled that future employment eligibility was a mandatory subject of bargaining, an issue which *Garmon* relegates to the exclusive jurisdiction of the Board.

The court below also held that because it could find no provision of GM's collectively-bargained Voluntary Employment Termination Plan (VTEP) specifically addressing Plaintiffs' claims, the action was not pre-empted by § 301 of the Labor Management Relations Act. This conclusion is in conflict with this Court's decision in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985), and the decisions of several other courts of appeals concluding that § 301 pre-emption is not limited by the four corners of the contract.

Moreover, the Fifth Circuit also ruled that the VTEP was not an employee benefit *plan*, so that the broad pre-emptive provision of the Employee Retirement Income Security Act was inapplicable. In so doing, the court misconstrued this Court's holding in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211 (1987), which concluded that a state statute requiring a one-time severance payment in the event of a plant closing did not require the employer to maintain the type of administrative process that connotes an employee benefit plan. Since the VTEP *did* require such a process, the Fifth Circuit's holding that ERISA does not pre-empt this action is erroneous.

4. EEAC has participated as amicus curiae in several cases in this Court involving preemption of state suits

by federal law.[1] In addition, EEAC has filed amicus curiae briefs with this Court in a number of other cases dealing with the interrelationship between state and federal laws and the relationship between nondiscrimination laws and collective bargaining agreements.[2]

EEAC's interest in this case lies in its desire that the process of collective bargaining not be undermined by an unduly narrow interpretation of the pre-emptive force of federal labor laws, allowing persons in states that permit widely varied employment-related individual tort causes of action to resort to the state courts and state law to resolve disputes more properly addressed through application of uniform federal law. The decision of the Fifth Circuit below, which adopts a severely restrictive interpretation of pre-emption under the NLRA, the LMRA and ERISA, creates undue confusion among the employer community concerning the appropriate forum and applicable law in these cases.

Because of its significant experience, EEAC is uniquely situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally, as opposed to its significance to the immediate parties.

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[1] *See Caterpillar, Inc. v. Williams*, 107 S. Ct. 2425 (1987) (§ 301 pre-emption); *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988) (§ 301 pre-emption); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (ERISA pre-emption). Moreover, the National Foundation for the Study of Equal Employment Policy, the educational foundation associated with EEAC, published a monograph entitled *Allis-Chalmers Corporation v. Lueck: The Impact of the Supreme Court's Decision on Wrongful Discharge Suits and Other State Court Employment Litigation* (1986).

[2] *See Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) (Title VII preclusion); *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982) (Title VII backpay and seniority); *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (Title VII and a seniority system); *IUE, Local 790 v. Robbins & Meyers*, 429 U.S. 229 (1976) (Title VII and a grievance limitations period).

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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MARY R. WELLS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council ("EEAC"), respectfully submits this brief amicus curiae contingent upon the granting of the accompanying motion.[1] The brief supports the petition for a writ of certiorari filed in this case by General Motors Corporation, and urges reversal of the decision below.

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is fully set forth in the accompanying motion.

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[1] A letter of consent on behalf of the petitioner has been filed with the Clerk of the Court.

STATEMENT OF THE CASE

General Motors Corporation's (GM's) Packard Electric Division plant is located in Clinton, Mississippi. Pet. 2.[2] Employees at that plant are represented by Local No. 698 of the International Union of Electrical, Radio & Machine Workers, AFL-CIO. *Id.*

Due to a decline in the automobile industry, the Packard Electric plant held planned layoffs in 1982. Pet. App. 2a. A committee of union and management representatives negotiated a severance pay agreement known as the Voluntary Termination of Employment Plan (the VTEP). *Id.* Under the VTEP, eligible laid-off employees could receive from $10,000 to $22,000, payable in a lump sum or in 24 monthly installments, in return for terminating their employment relationship with GM and relinquishing seniority and other rights. Pet. 2-3; Pet. App. 41a-43a. After execution of the VTEP agreement, union and management officials met with employees to explain its terms. Pet. 4.

In 1985, GM began hiring new employees at the Packard Electric plant, but declined to consider the applications of former employees who had taken VTEP. Pet. 4. Plaintiffs, thirty-two former Packard Electric employees who took VTEP benefits, now claim that GM induced them to terminate their employment by fraudulently misrepresenting the consequences of accepting VTEP. Pet. App. 4a.

As the Fifth Circuit noted below, the issue of reemployment rights for those employees who chose the VTEP was discussed in the negotiations. Pet. App. 3a. According to GM, the issue of future employment eligibility was raised during the collective bargaining process as the VTEP was developed, where management negotiators

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[2] Citations to the Petition for a Writ of Certiorari are designated as Pet. ——. Citations to the Petitioner's Appendix, including those to the decision below, are designated as Pet. App. ——.

made it clear to the union representatives that employees who took VTEP would not be eligible to be rehired. *Id.* GM maintains as well that when the plan was presented to employees, they too were told that employees electing VTEP would not be eligible for future employment with GM. *Id.*

In contrast, plaintiffs claim that when union representatives asked about future employment rights during collective bargaining over the VTEP terms, they were told that it would be "no problem." *Id.* Plaintiffs further assert that when the plan was explained to them, they were told not only that they would be eligible for reemployment but that they would be given preference over other applicants. Pet. App. 46a.

Plaintiffs brought suit in federal district court, alleging claims under state law theories of fraud and misrepresentation. GM moved for summary judgment, arguing that the action was pre-empted (1) under the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), because GM's alleged conduct was "arguably prohibited" by § 8 of the National Labor Relations Act, 29 U.S.C. § 158, thus placing jurisdiction with the National Labor Relations Board and depriving the district court of subject matter jurisdiction; (2) under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, because it involved the terms of a collective bargaining agreement, and (3) under § 514(a) of the Employee Retirement Income Security Act, 29 U.S.C. § 1144(a), because it relates to an employee benefit plan. The motion was denied, and the district court certified the question for interlocutory appeal. Pet. App. 2a.

The Fifth Circuit affirmed. First, the court concluded that under this Court's decision in *International Longshoremen's Ass'n. v. Davis*, 476 U.S. 380 (1986), a party seeking pre-emption under *Garmon* on the grounds that it is accused of conduct "arguably prohibited" by § 8 of the NLRA must demonstrate both that § 8 arguably pro-

hibits such conduct *and* that it is likely to prevail on the merits (i.e., that the Act does not prohibit such conduct). Second, after reading the contract and determining that none of its provisions specifically addressed Plaintiffs' claims, the court ruled that § 301 of the LMRA did not pre-empt the tort action brought under state law, even though *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (1985), requires § 301 pre-emption when the issue is "what the parties to a labor agreement agreed." *Id.* at 211. Third, the court ruled that the VTEP was not an employee benefit *plan* subject to ERISA pre-emption, even though implementation of the VTEP required an ongoing administrative scheme such as that distinguished in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211 (1987).

SUMMARY OF REASONS FOR GRANTING THE WRIT

San Diego Building Trades Council v. Garmon, 359 U.S. 236, places exclusive jurisdiction in the National Labor Relations Board when the conduct in question is "arguably prohibited" by § 8 of the National Labor Relations Act. The Fifth Circuit's decision would require a party seeking pre-emption to demonstrate both that its conduct was arguably unlawful under § 8 of the NLRA and also that it is likely to succeed on the merits before the National Labor Relations Board—two mutually inconsistent propositions. By adopting an inverted interpretation of this Court's decision in *International Longshohemen's Association v. Davis*, 476 U.S. 380, which established the burden of proof under *Garmon* as requiring the party seeking pre-emption to show that the Board "reasonably could uphold a claim based on such an interpretation," 476 U.S. at 395, the court below in effect abolished the "arguably prohibited" prong of *Garmon*.

In addition, the Fifth Circuit's decision would allow state law to control interpretation of a collectively-bargained agreement, which is subject to federal law un-

der § 301 of the LMRA, merely because the court found no specific provision of the VTEP which it believed addressed Plaintiffs' claims. In contrast, this Court concluded in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202, that § 301 pre-emption extends to "questions relating to what the parties to a labor agreement agreed." 471 U.S. at 211. Moreover, the Fifth Circuit's decision conflicts with those of several other courts of appeals holding that § 301 pre-emption extends to state law tort claims concerning extra-contractual promises.

Further, the Fifth Circuit erroneously concluded that the VTEP was not an "employee benefit plan," so that the explicit pre-emption provision of ERISA did not apply. The Fifth Circuit relied on this Court's ruling in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211, which held that a state law requiring a single severance payment in the event of a plant closing did not necessitate an administrative process and thus was not an employee benefit *plan* calling for ERISA pre-emption. Here, the negotiated VTEP required GM to create and maintain administrative procedures to process benefit applications, payments, revocations and complaints, so that the Fifth Circuit erred in concluding that ERISA pre-emption did not apply.

The Fifth Circuit's decision conflicts in every important respect with prior decisions of this Court and several of the courts of appeals requiring pre-emption by federal law where Congress has regulated the field. With the National Labor Relations Act, the Labor Management Relations Act, and the Employee Retirement Income Security Act, Congress established an exhaustive federal system for regulating labor-management relations which this Court's decisions traditionally have shielded against excessive interference from private lawsuits under state law. The Fifth Circuit would allow important industrial relations issues to be decided under varying principles of state law, create significant confusion regarding the na-

ture and scope of federal pre-emption of industrial relations, and cause serious concern among the employer community. For these reasons, it is crucial that this Court grant the petition to dispel the confusion and further define the scope of federal pre-emption.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' HOLDING THAT A PARTY SEEKING PRE-EMPTION UNDER THE NLRA MUST DEMONSTRATE BOTH THAT ITS CONDUCT IS "ARGUABLY PROHIBITED" AND THAT ITS POSITION IS LIKELY TO SUCCEED ON THE MERITS BEFORE THE BOARD IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *GARMON* AND *DAVIS* AND THOSE OF SEVERAL COURTS OF APPEALS AND THUS UNDERMINES FEDERAL LABOR POLICY FAVORING PRE-EMPTION

A. The Court of Appeals' Decision Virtually Eliminates the "Arguably Prohibited" Prong of *Garmon* By Requiring The Party Seeking Pre-Emption To Prove Mutually Inconsistent Propositions

The Fifth Circuit concluded that a party seeking pre-emption under the doctrine established by this Court's opinion in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, must demonstrate not only that its conduct is "arguably prohibited" by § 8 of the National Labor Relations Act, but also that "the Board could reasonably uphold *that party's* claim" (i.e. its claim that its conduct did not violate the NLRA). Pet. App. 8a-9a (emphasis supplied). In so doing, the court below mistakenly applied the burden of proof set forth in *International Longshoremen's Association v. Davis*, 476 U.S. 380, which requires the party seeking pre-emption to "put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation." *Id.* at 395. The Fifth Circuit's decision requires a party

to prove two mutually inconsistent propositions, and thus effectively abolishes pre-emption of all future cases in that Circuit where the alleged conduct is "arguably prohibited" by the NLRA.

This Court in *Garmon* created a standard designed to guide future resolution of the difficult problem of ascertaining where federal regulation ends and state jurisdiction begins.[3] The Court delineated two clear guidelines establishing when an issue is relegated to the exclusive jurisdiction of the Board: (1) "[w]hen it is *clear or may fairly be assumed* that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, . . ." *id.* at 244 (emphasis added); and (2) "[w]hen an activity is *arguably subject* to § 7 or § 8 of the Act . . . ." *Id.* at 245. (emphasis added).[4] In either of these situations, the Court has decreed that state

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[3] As this Court recognized in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, Congress has not exercised the full scope of its authority under the Commerce Clause to pre-empt the field of industrial relations, but chose instead to regulate only in certain areas, leaving others "free for the operation of economic forces" and still others for regulation by the states. The boundaries between these categories are not clearly delineated, and thus can be defined only through the process of litigation. *Id.* at 240, quoting *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480-81 (1985).

[4] The Court recognized only two exceptions to this rule: it will not find that Congress intended to pre-empt the field "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act," *Garmon*, 359 U.S. at 243, "[o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] could not infer that Congress had deprived the States of the power to act." *Id.* at 244. A separate line of analysis, not relevant here, has evolved "focusing upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces.'" *Lodge 75, International Association of Machinists and Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 140 (1976).

interests must yield to the primary jurisdiction of the National Labor Relations Board.

Tracing the development of judicially created boundaries in this area, the Court observed that "the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency [the National Labor Relations Board], armed with its own procedures, and equipped with its specialized knowledge and cumulative experience." 359 U.S. at 242, citing *Garner v. Teamsters, etc. Union*, 346 U.S. 485, 490-491 (1953).

In the instant case, GM sought *Garmon* preemption on the ground that the plaintiffs' allegations, if true, constituted a charge of conduct arguably prohibited by § 8 (a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), which requires an employer to bargain in good faith with the representatives of its employees. If, as asserted by the plaintiffs, GM misrepresented its position on future employment eligibility during collective bargaining over the terms of the VTEP, or made conflicting representations to individual employees in presenting the plan for their consideration, its good faith under § 8(a)(5) was called into question. Accordingly, Plaintiffs accused GM of conduct that was "arguably prohibited" under *Garmon*, so that jurisdiction over the issue properly belonged with the National Labor Relations Board. On this basis alone, the Court of Appeals' decision that there was not preemption should be reversed.

The Fifth Circuit's error has significance reaching far beyond this case, moreover, because it rests on a fundamental misconstruction of the standard for *Garmon* preemption. In *International Longshoremen's Association v. Davis*, 476 U.S. 380, the Court articulated the burden of proof placed upon a party seeking pre-emption under *Garmon*. Observing that "the pre-emption inquiry is whether the conduct at issue was arguably *protected or*

prohibited by the NLRA," *id.* at 394 (emphasis added), the Court stated:

> If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board. . . . The party must then put forth enough evidence to enable the court to find that the Board reasonably could uphold a claim based on such an interpretation.

476 U.S. at 395 (citation omitted). As clarified in *Davis*, "a party asserting pre-emption must put forth enough evidence to enable a court to conclude that the activity is arguably subject to the Act." *Id.* at 398. The issue is whether the case raises issues arguably governed by the NLRA, not whether the employer has shown that its conduct violated the Act.

The interpretation given to *Davis* by the Fifth Circuit, however, would effectively abolish the standard set forth in *Davis*, at least for cases involving conduct "arguably prohibited" by the NLRA. Misreading the burden of proof required by *Davis*, the court below stated that "the party attempting to invoke the Board's jurisdiction must then demonstrate that the Board could reasonably uphold *that party's* claim." Pet. App. 8a-9a (emphasis added). It stated that because GM's argument went only to show "that its conduct was arguably *prohibited* by the Board, . . . its claim before the Board could not reasonably be *upheld* by the Board." Pet. App. 9a (emphasis in original).

The Fifth Circuit thus misconstrued this Court's opinion in *Davis* as requiring an employer seeking pre-emption to demonstrate both that its conduct is arguably violative of the NLRA and also that the employer is

likely to win before the Board on the merits of the claim. Moreover, the court appears to have reasoned that if an employer has met the former requirement, it is effectively precluded from meeting the latter. In effect, the court would require the employer to show that the Act arguably prohibits the alleged conduct, but that the Board would uphold the employer's defense. If the credibility of the Board is to be maintained, this standard presents a logical impossibility. The Fifth Circuit's construction of *Davis* thus creates a Catch-22 situation from which no party seeking pre-emption under the "arguably prohibited" prong of *Garmon* can emerge victorious.

Where the "arguably prohibited" prong of *Garmon* is involved, the only reasonable construction of *Davis* is that the moving party must show that *its opponent's* claims, if true, reasonably could be upheld by the Board. This interpretation of the proper legal standard is in accord with well-established national labor policy. Under both the National Labor Relations Act[5] and the Labor Management Relations Act,[6] this Court has required federal pre-emption where "the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations." *Garmon*, 359 U.S. at 243. *See also Local 174, Teamsters v. Lucas Flour Company*, 369 U.S. 95, 103 (1962) ("The dimensions of § 301 [of the LMRA] require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute."). By relegating conduct arguably prohibited by the NLRA to scrutiny under state law, the Fifth Circuit's holding erodes the strong preference for federal pre-emption established by Congress and long maintained by this Court. In an area where there is a compelling need for uniform federal policy, the court below has created a significant

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[5] *See, e.g., San Diego Building Trades Council v. Garmon*, 359 U.S. 236.

[6] *See, e.g., Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202.

gap which allows for the intrusion of varied principles of state law which will lead inevitably to conflicting results.

B. The Court of Appeals' Decision Conflicts With Decisions of Other Courts of Appeals Which Have Applied The *Garmon* Doctrine

Significantly, other federal courts of appeals have reviewed similar cases since *Davis* and have found NLRA pre-emption using the analysis suggested above, without the self-defeating exercise adopted by the Fifth Circuit. In *Parker v. Connors Steel Co.*, 855 F.2d 1510 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989), for example, a group of employees presented a state law fraud claim that the company had obtained concessions from the union by misrepresenting that the plant would remain open. The Eleventh Circuit concluded that the employees' allegations, if taken as true, would constitute a claim of failure to bargain in good faith, and applied *Garmon* to pre-empt the claim. The Seventh Circuit reached a similar result in *Kolentus v. Avco Corporation*, 798 F.2d 949 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987), holding that state law fraud claims that an employer misrepresented facts and failed to disclose an impending plant closing when negotiating a collective bargaining agreement amounted to unfair labor practice claims under § 8(a)(5) and thus were pre-empted by *Garmon*.[7] The Fifth Circuit's decision thus conflicts with those of other circuits. This dissonance in court rulings must be harmonized by Supreme Court review.

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[7] *See also Overby v. Chevron USA, Inc.*, 884 F.2d 470 (9th Cir. 1989) (recognizing a potential § 8 violation in a state law wrongful discharge claim and remanding for consideration of pre-emption issue).

II. THE COURT OF APPEALS' HOLDING THAT THIS ACTION DOES NOT REQUIRE INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT AND THUS IS NOT PRE-EMPTED BY § 301 OF THE LMRA CONFLICTS WITH THE *ALLIS-CHALMERS* STANDARD THAT ISSUES THAT DEPEND UPON THE MEANING OF A COLLECTIVE BARGAINING AGREEMENT MUST BE DECIDED UNDER FEDERAL LAW

A. The Court of Appeals' Erroneous Holding That State Law Claims Are Not Pre-Empted Unless Covered By A Specific Contract Term Substantially Narrows The Scope of Pre-emption Under § 301

The court below held that Plaintiffs' claims were based on rights under state law independent of those created by the collectively-bargained VTEP, so that pre-emption under § 301 of the Labor Management Relations Act would not apply unless the agreement contained provisions that could be construed to govern those rights.[8] Pet. App. 16a. Having reviewed the VTEP and determined that it did not contain any such provisions, the court concluded that § 301 pre-emption did not apply.

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[8] Section 301(a) of the Labor Management Relations Act provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). This Court has held that "Section 301 contemplates suits by and against individual employees as well as between unions and employers." *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562 (1976). While § 301 does not vest exclusive jurisdiction in the federal courts, *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), it requires that federal law be applied. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962).

This reasoning conflicts with this Court's decision in *Allis-Chalmers Corporation v. Lueck*, 471 U.S. 202 (§ 301 preempts state law allegations of bad faith handling of disability claim). Instead:

> *questions relating to what the parties to a labor agreement agreed*, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 211 (emphasis added). The proper inquiry in such a case is "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Id.* at 213.[9] Thus, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

The state law claims in this case are intertwined with the VTEP agreement and substantially dependent upon its interpretation. The VTEP's existence, creation, negotiation, and consequences are the bases for this lawsuit. The parties' total disagreement over what was said about future employment eligibility during the negotiation process raises precisely the issue outlined in *Allis-Chalmers*: a question as to what the parties to the VTEP —the union and GM—agreed. Indeed, the Fifth Circuit itself had to review the VTEP agreement and make a

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[9] *See also International Brotherhood of Electrical Workers, AFL-CIO v. Hechler*, 107 S.Ct. 2161 (1987) (in state law negligence suit by employee against union alleging duty to provide safe working environment, primary inquiry is existence and scope of duty of care imposed by collective bargaining agreement, necessitating contract interpretation).

determination as to its contents in order to reach its conclusion that none of the VTEP provisions affected Plaintiff's claims.[10]

Thus, § 301 pre-emption is compelled. The Fifth Circuit's rationalization ignores the clear mandate of *Allis-Chalmers* that § 301 pre-emption is not limited by the four corners of the contract, but also extends to "questions relating to what the parties to a labor agreement agreed." 471 U.S. at 211. The appropriate avenue of relief in a claim so clearly interrelated with collective bargaining is by way of § 301, not a tort suit under state law. If the Fifth Circuit's holding is permitted to stand, numerous collective bargaining agreements will be subject to state tort suits, undermining the collective bargaining process and resulting in the type of chaos § 301 was designed to prevent.

B. The Fifth Circuit's Holding Conflicts With Decisions Of Other Courts Of Appeals Which Have Concluded That State Law Tort Claims Concerning Extra-Contractual Promises Are Pre-empted By § 301

The Fifth Circuit's holding that Plaintiffs' claims fell outside the collectively-bargained VTEP and thus were not subject to § 301 pre-emption conflicts with decisions of other circuit courts of appeals. The Ninth and Eleventh Circuits have ruled that state law fraud claims aris-

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[10] Unlike the individual contracts reviewed in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), where the contract at issue was made when the plaintiffs held managerial positions and before they became employee members of the bargaining unit, Plaintiffs' claims herein are dependent upon a labor contract and concern rights which were discussed during negotiation of the agreement with Plaintiffs' representatives. Similarly, as no independent state statutory right is involved, the instant case differs greatly from *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988) (state tort suit for retaliatory discharge for filing a workers' compensation claim could be decided without interpreting collective bargaining agreement).

ing from extra-contractual promises made to employees covered by a collective bargaining agreement at the time the promises were made are pre-empted by § 301. *DeLapp v. Continental Can Company, Inc.*, 868 F.2d 1073 (9th Cir. 1989) (oral promise not to enforce recall provision of collective bargaining agreement disqualifying employee from receiving early retirement benefits); *Darden v. United States Steel Corporation*, 830 F.2d 1116 (11th Cir. 1987) (promise of job security).[11] Because of the conflict between the decision below and those of the Ninth and Eleventh Circuits, this Court should grant review.

III. THE COURT OF APPEALS' HOLDING THAT THE VTEP IS NOT AN EMPLOYEE BENEFIT PLAN GOVERNED BY ERISA MISCONSTRUES THE VTEP AS A SINGLE EVENT AND THUS MISAPPLIES THIS COURT'S HOLDING IN *FORT HALIFAX*

The court below erroneously relied on this Court's decision in *Fort Halifax Packing Company, Inc. v. Coyne*, 107 S.Ct. 2211, to conclude that ERISA did not pre-empt the tort claims presented here.[12] Pet. App. 19a. In *Fort*

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[11] Parenthetically, a related circuit split exists among cases involving misrepresentations made *before* the aggrieved individuals became employees subject to the collective bargaining agreement. While the Ninth Circuit has held that such claims are pre-empted by § 301, *see Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987), the Third, Eighth and Eleventh Circuits have held that such claims are *not*. *See Berda v. CBS Inc.*, 881 F.2d 20 (3d Cir.), *petition for cert. filed*, No. 89-589 (Oct. 13, 1989); *Anderson v. Ford Motor Company*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 483 U.S. 1011 (1987); *Varnum v. Nu-Car Carriers*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 481 U.S. 1049 (1987).

[12] Section 514(a) of the Employee Retirement Income Security Act (ERISA), comprehensively pre-empts state regulation of employee benefit plans as follows:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or

Halifax, this Court reviewed a state law mandating a single lump sum payment of one week's pay for each year of service to employees affected by a plant closing, and concluded that such a law was not pre-empted by ERISA. The Court reasoned that ERISA pre-emption applies only to employee benefit *plans*, requiring administrative activity, and not to a one-time lump sum payment mandated by the occurrence of a single event such as a plant closing. *Id.*

The VTEP at issue here certainly required GM to do "more than write a check . . . ." *Fort Halifax*, 107 S. Ct. at 2218.[13] Also, unlike the state-mandated one-time severance payment involved in *Fort Halifax*, the VTEP was integrated into a collectively-bargained plan that in turn had other ongoing obligations that were related to rights derived from a broader collective bargaining agreement.[14]

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hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). As this court has recognized, this section was "meant to establish pension plan regulation as exclusively a federal concern." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

[13] Severance pay plans can be "employee benefit plans" under ERISA. *See Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Industries, Inc.*, 477 U.S. 901 (1986); *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986). Under Department of Labor regulations interpreting ERISA, severance pay plans, along with "benefits which are in substance severance benefits, although not so characterized," are employee benefit plans under ERISA. 29 C.F.R. § 2510.3-1(a)(3).

[14] For example, the VTEP required filing an application and management approval. Pet. App. 41a. While a lump sum payment was an option, the VTEP also allowed employees to elect to receive their benefits in twenty-four monthly installments, thus necessitating an administrative process to pay benefits over a two-year period. Pet. App. 42a. It included a fourteen-day revocation option as well as a complaint procedure allowing appeal and review under the

The Fifth Circuit's ruling makes employee benefit plans such as the VTEP vulnerable to the nuances of state law, creating a severe burden for employers, particularly those doing business in more than one state. Nor is this an isolated problem; a full forty percent of collective bargaining agreements sampled in a recent study contained severance pay provisions. *See Basic Patterns: Income Maintenance*, Collective Bargaining Negotiations and Contracts (BNA) No. 1144 at 53:2 (April 6, 1989). Under the decision below, the state courts will be treated to a steady flow of severance-related issues that instead should be decided under federal law. The scope of this problem, and the potential negative effect of the Fifth Circuit's decision on Congress' desire for a uniform regulatory ERISA scheme, compel review by this Court.

Supplemental Unemployment Benefit (SUB) procedures established in the main bargaining agreement. Pet. App. 43a. All appeals would be "locally handled." *Id.* Together, these provisions require an ongoing scheme to process applications, revocations, payments and complaints. *Cf. Pane v. RCA Corporation*, 868 F.2d 631 (3d Cir. 1989) (state law contract and tort claims regarding severance pay agreement requiring administrative scheme preempted by ERISA).

Thus, the VTEP contained and required a "set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation." *Fort Halifax*, 107 S.Ct. at 2217.

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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